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In The

Supreme Court of the United States

MARIA F. GOODSON and ALEXANDROS F. GOODSON,

Petitioners,

versus

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. If a government license is alleged to have been obtained by fraud, is the nonexistent, not-yet-issued license, or the right to control its issuance, "property" of the government licensing authority within the meaning of the federal mail and wire fraud statutes' requirement that the victim be defrauded of money or property?

2. Does a split of opinion among the federal circuit courts of appeals on the question of whether the mail fraud statute actually criminalizes certain acts provide notice of criminality sufficient to meet the fair notice requirement of due process?

3. Does the trial court's failure to instruct the jury that materiality is a necessary element of mail fraud, as well as the failure of both the trial and appeals courts to consider the sufficiency of evidence with respect to the materiality element of petitioner Maria Goodson's mail fraud conviction, require that the decision below be vacated and remanded for reconsideration in light of *Neder v. United States*, ___ U.S. ___, 119 S. Ct. 1827 (1999)?

4. If a criminal conviction is based primarily or exclusively on circumstantial evidence, does the proof beyond a reasonable doubt standard require a court, when addressing a judgment of acquittal motion or a claim of insufficient evidence to convict, to determine whether the evidence as a whole excludes every reasonable hypothesis of innocence? Is the Fifth Circuit's sufficiency of evidence standard correct with respect to circumstantial evidence – that "[t]he evidence need not

QUESTIONS PRESENTED – Continued

exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, and [that] the jury is free to choose among reasonable constructions of the evidence"?

5. In a RICO criminal forfeiture proceeding, is the court required to apply state law in determining whether an intervening third party has the requisite vested or superior "right, title and interest" in forfeited property to defeat its forfeiture to the government?

LIST OF PARTIES

The following were parties to the proceedings in the United States Court of Appeals for the Fifth Circuit:

1. Maria F. Goodson *(defendant, forfeiture intervenor, appellant, cross-appellee)*
2. Alexandros F. Goodson *(forfeiture intervenor, appellant)*
3. Fred H. Goodson *(defendant, appellant)*
4. Carl W. Cleveland *(defendant, appellant)*
5. Larry S. Bankston *(defendant, appellant, cross-appellee)*
6. United States of America *(plaintiff, appellee, cross-appellant)*

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Maria F. Goodson and Alexandros F. Goodson respectfully request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on July 21, 1999.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 182 F.3d 296 (5th Cir. 1999) and is reproduced in the Appendix at A.1a.[1] The Fifth Circuit's denial of petitioner Maria Goodson's petition for en banc rehearing is unreported and is reproduced at A.45a. The Fifth Circuit's denial of both petitioners' request for panel rehearing is unreported and is reproduced at A.48a. The opinion of the District Court holding that unissued video poker licenses are "property" under the federal mail fraud statute is reported at 951 F.Supp. 1249 (E.D.La. 1997) and is reproduced at A.50a. The orders of the District Court denying petitioner Maria Goodson's motion for judgment of acquittal and both petitioners' third party claims to forfeited property are unreported and are reproduced at A.85a and A.167a, respectively.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was issued on July 21, 1999. The Court of Appeals denied petitioners' request for rehearing on September 22, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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[1] "A." denotes the appendix to this petition; "T." the trial transcript; "R." the appeal record of the criminal convictions, forfeitures and sentences; and "FT." the transcript of the forfeiture intervention hearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . "

The federal mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, and applicable provisions of the RICO criminal forfeiture statute, 18 U.S.C. § 1963, are set forth in the Appendix at A.175a-180a.

STATEMENT OF THE CASE

1. Factual Background

Maria Goodson was a 23 year old college student, still living with her parents, at the beginning of 1992 when her father, Fred Goodson, decided to branch out into the video poker business recently legalized by the Louisiana legislature. Prior to that time Fred Goodson and his family had been in the truckstop business in Slidell, Louisiana, for 20 years, operating one of the largest truck stops in the southeastern United States. Goodson, a successful businessman who came from an underprivileged background, had started several family businesses over the years and had given his adult children, Maria and Alex, a partial or full ownership interest in a number of them.

In early 1992, after the Louisiana legislature enacted a law permitting the operation of video poker machines at certain business establishments, including truck stops, Fred Goodson and his family formed a limited partnership, Truck Stop Gaming, Ltd. ("TSG"), to participate in the video poker business at their Slidell truck stop and, potentially, other truck stops. Alex and Maria each became owners of 49% of TSG as limited partners. A separate corporation, Truck Stop Gaming, Inc. ("TSG, Inc."), owned the remaining 2% of TSG and served as general partner. Alex and Maria each owned 50% of its stock. Fred Goodson served as the company's general

manager. TSG was formed by means of a written limited partnership agreement executed by Maria and Alex and filed with the Louisiana Secretary of State, as required by law for the creation of limited partnerships.

In addition to their ownership interests in several family businesses, Alex and Maria each went to work in one of them. At the time of TSG's formation, Alex was 28 years old and managed a Hardee's fast food restaurant owned and operated by the Goodsons as another family business. In the fall of 1993, a year and a half after TSG's formation, Maria, upon graduation from college, began managing TSG's video poker facility at the Slidell truck stop. As head of the family and an experienced businessman, Fred Goodson oversaw the operations of and controlled all of the family businesses, including TSG.

TSG was formed with the help of attorney Carl Cleveland and other members of his law firm, Cleveland, Barrios, Kingsdorf & Casteix ("CBK&C"). The law firm had represented Fred Goodson in prior litigation and continued to represent the Goodson family in various matters, some related and others unrelated to TSG and its business development activities. CBK&C also assisted the Goodsons in preparing and submitting to the Louisiana State Police, Louisiana's video poker regulatory agency at the time, TSG's original application for its gaming license.

In addition to providing legal assistance, CBK&C, along with Fred Goodson, loaned Maria and Alex the start-up capital for TSG. These loans, each in the amount of $245,000, were evidenced by promissory notes, payable on demand and bearing interest at 10% per annum. The members of the law firm anticipated that at some time in the future, they would be repaid their loan as well as legal fees for work they performed on behalf of TSG or they would convert their loan to an ownership interest in the company.

In February 1992, TSG applied for a video poker license from the Louisiana State Police and received it in May 1992. Video poker license applicants were required to undergo an investigation in which the State Police

were authorized to determine whether the holders of a 5% or more ownership or revenue interest in the applicant company and persons exercising significant influence or control over the activities of a potential licensee were suitable for licensing. La. Rev. Stat. Ann. § 33:4862.10(D) (recodified at La. Rev. Stat. Ann. § 27:310(D)). Consistent with the terms of the partnership agreement, the application submitted on behalf of TSG identified Maria, Alex and TSG, Inc., as the limited partners and general partner, respectively, of the partnership. It also disclosed the fact that all initial capital of the partnership had been loaned to the partners by Fred Goodson and CBK&C. It further disclosed that Fred Goodson acted as general manager of the business and exercised control over its affairs. Renewal applications were submitted to and approved by the State Police for the years 1993, 1994 and 1995. Each of the applications contained essentially the same information as the original application.

In August of 1994, after a year of successful operation at the Slidell truck stop and as a part of an effort to expand TSG's video gaming business to other truck stop locations, the Goodsons entered into an agreement with Benny Rayburn, the son of then State Senator B.B. Rayburn, and himself a former sheriff of Washington Parish, Louisiana, to sell him a small percentage interest in TSG's net revenues from the operation of the Slidell truck stop video poker facility in exchange for his future assistance to TSG in developing and operating a truck stop video poker facility in his hometown of Bogalusa, Louisiana, where the Rayburn family's prominence in the community would be a business asset. The agreement contemplated that once the Bogalusa facility was developed, Rayburn would trade his interest in TSG for a comparable interest in the Bogalusa operation. T., pp. 4113-4120.

At the request of her father, Maria signed a document entitled "Sale of Partnership Interest and Pledge Agreement" which purported to convey to Rayburn, in its

introductory paragraph, "a 4.99% interest out of a 100% interest in the Truck Stop Gaming, Ltd. partnership on the following terms and conditions, . . . " A.206a-210a. Among the "terms and conditions" were those contained in §4 of the agreement, entitled "Limitation of Financial Interest," which stated that "It is the intention of the parties to this agreement that Purchaser's interest in the business operations of the partnership shall be limited to the video poker gaming activities that the partnership conducts at the Slidell 76 Auto/Truck Plaza in Slidell, Louisiana." A.207a. Section 7 of the agreement provided for the future exchange of Rayburn's interest in the Slidell operation "for an equal interest in another video poker facility operated at some other place in the State of Louisiana." A.208a. Although the agreement loosely referenced conveyance to Rayburn of a "partnership interest" or an "ownership interest" in the partnership, its net effect, when read as a whole, was to convey to Rayburn an interest in net revenues from TSG's present gaming facility in Slidell to be exchanged at some future date for an interest in revenues from the operations of another video poker facility.[2] T., pp. 3442-3446, 4119-4120. Several months after signing the agreement, Rayburn transferred the interest he had acquired in TSG to a company he formed with his two sisters, BAJ, LLC. T., pp. 4123-4124.

2. Indictment and Proceedings in District Court

In July, 1996, as a result of a federal investigation of alleged corruption involving Louisiana legislators and

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[2] The agreement expressed that Maria was conveying a 4.99% interest "out of a 100% interest . . . " If the "interest" conveyed to Rayburn was intended to be an actual ownership, rather than a percentage of revenues, interest, technically, Maria Goodson could not have conveyed 4.99% "out of a 100%" ownership interest since she only owned 49% of TSG and could only have conveyed some portion of 49% and not 100%.

individuals involved in the gaming industry, Fred Goodson, Maria Goodson, family attorney Carl Cleveland, and the family's accountant, as well as two state legislators, were charged in a 19 count indictment with a variety of offenses ranging from racketeering and racketeering conspiracy to mail fraud, illegal gambling, money laundering, tax conspiracy, aiding and abetting a false tax return and interstate communications in aid of racketeering.[3] The government did not indict Alex Goodson, but subsequently named him an unindicted co-conspirator.

a. The Mail Fraud Charges

Most of the charges against the Goodsons, their attorney and their accountant were unrelated to any allegations of political corruption and instead were focused on the establishment, licensing and operation of TSG. The core of the government's case against Maria Goodson, her father and the family's attorney and the centerpiece of the mail fraud counts charged in the indictment was the government's theory that despite what the partnership agreement provided, Fred Goodson and Carl Cleveland, not Maria and Alex Goodson, were the owners of TSG. According to the indictment, TSG was put in the name of Maria and Alex to conceal the identity of "true owners" Fred Goodson and Cleveland, in a scheme to defraud the State of Louisiana into granting TSG its original and renewal video poker licenses, which the company

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[3] Prior to the indictment, the government made an unsolicited offer to Fred Goodson not to indict his daughter at all if he would provide the government incriminating information on one or more legislators. R., pp. 1128-1165. Fred Goodson did not provide such information, possibly because he could not, and Maria Goodson, along with the other defendants, was charged in almost every count of the indictment, even though no evidence was introduced at trial linking her to most counts. She was subsequently convicted of one count of mail fraud and acquitted on all other counts. See p. 11 infra.

allegedly would not have obtained had Fred Goodson and Cleveland been identified as the owners of the company.[4] The government claimed that Goodson and Cleveland concealed their true ownership in order to avoid the scrutiny of their finances that would attend a suitability investigation conducted by the State Police.

However it was undisputed at trial that the initial application disclosed that CBK&C and Fred Goodson had fully capitalized TSG, and that disclosure subjected them to a suitability investigation. It was also undisputed that TSG disclosed Fred Goodson's significant influence on and control of the business, which disclosure also subjected him to a suitability investigation. In fact, the evidence at trial showed that the State Police did conduct a suitability investigation of Fred Goodson and found him suitable. T., pp. 1003-1008. In addition there was no evidence that either Fred Goodson or Maria Goodson was aware of any basis for Carl Cleveland's alleged unsuitability or that Cleveland had any reason to hide any interest he might acquire in TSG.[5]

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[4] The four mail fraud counts of the indictment, Counts 3-6, related to the original application and gaming license obtained by TSG in 1992 and the renewal applications and licenses obtained in 1993, 1994 and 1995.

[5] In the indictment, the government charged that the motive for allegedly hiding the true owners of TSG was to conceal the fact that Cleveland had not filed certain personal income tax returns. At the time of TSG's initial license application, February 1992, the only tax return due and not filed by Carl Cleveland was his 1990 return. The indictment alleged that as of July 1995, he also had not filed returns for the subsequent years 1991-1994. Trial evidence showed that Cleveland had not filed these returns because his 1989 federal tax return was being audited by the IRS during this period of time and the outcome of that audit would have affected all subsequent returns. The audit resulted in a favorable outcome for Cleveland and he did not owe, nor had failed to pay, the IRS any taxes due during the audit period. The Louisiana video

With respect to Maria Goodson specifically, trial evidence showed that, as regards Maria, (1) this was the third Goodson family business in which she and her brother were given an ownership interest, (2) the business was set up by her father and the family lawyers, (3) she exercised no operating control over any of the family businesses in which she had an ownership interest, including TSG, (4) TSG's license applications and related documents she signed were prepared by her father and attorneys at CBK&C with the request that she sign them, (5) she had no information or reason to believe that they were other than completely accurate when she signed them, and (6) since she was unaware of any impediment to suitability for licensing of her father, CBK&C or Cleveland, she had no reason to believe that her ownership interest in TSG served any illicit purpose.

In addition, with respect to Count 6 of the indictment, the mail fraud charge related to the 1995 license renewal application and the mail fraud count of which Maria Goodson was convicted, the government maintained that the 1995 application fraudulently failed to disclose, not only the Fred Goodson/Carl Cleveland "hidden ownership" interest, but also the alleged "hidden ownership" interest conveyed in late 1994 to Benny Rayburn and BAJ.

The government pointed to the title of the Benny Rayburn agreement, "Sale of Partnership Interest and Pledge Agreement," and to the language in the agreement purporting to "assing, sell, convey and deliver unto Benjamin B. Rayburn, Jr. a 4.99% interest out of a 100% interest in the Truck Stop Gaming, Ltd. partnership . . . " as evidence that Benny Rayburn had become a partner. The government also introduced into evidence a recorded

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poker regulations explicitly indicated that failure to file tax returns under review or dispute would not serve as a grounds for revocation, suspension or denial of a license. La. Administrative Code, Title 42, Part XI, § 2405(B)(6) (subsequently amended and presently in § 2405(B)(7)).

conversation in which Maria Goodson referenced BAJ as having become "4.9% partners or whatever . . . " A.194a. The evidence introduced by the government to show that the Benny Rayburn interest was required to be disclosed to the State Police consisted of the 1995 license renewal application form with newly revised language requesting disclosure of "all" owners[6] and the "summary" testimony of FBI agent and government witness Ken Gross that the Benny Rayburn interest was an ownership interest and, even at less than 5%, was required to be disclosed.[7]

However, other evidence at trial, including the Benny Rayburn agreement as a whole, indicated that the agreement did not convey as a whole an ownership interest, and at 4.99%, may not have been required, in any event, to be disclosed on the 1995 license renewal appplication. In addition to the Rayburn agreement, defendants introduced testimony of a law professor specializing in commercial law who had examined the Rayburn agreement and found that it did not convey an ownership interest in the TSG partnership to Rayburn. T., pp. 3442-3446. Defendants also introduced in evidence documents from the State Police stating that information was not required to be furnished to the state police (until sometime after the 1995 application) on holders of a less than 5% interest in a licensee. A.199a-205a.

The record contains no evidence at all that, when Maria signed the May, 1995 TSG license renewal application, she knew that the interest she had conveyed to Rayburn nine months earlier was required to be disclosed and she, nevertheless, deliberately omitted it in order to

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[6] Prior years' applications had requested the disclosure of first 5% or more owners, then "principal" owners.

[7] Under the statute and the regulations, disclosure of and suitability investigations were required and undertaken by the State Police on holders of 5% or more ownership interest in a licensee.

deceive the State Police.[8] The evidence instead showed that Maria played no role, other than executing documents at the request of her father and as prepared by the family's attorneys, in undertaking or structuring the Rayburn/BAJ relationship with TSG in August, 1994, or in preparing license renewal application forms nine months later in May, 1995. The government produced no evidence (1) that Maria knew of any fraudulent scheme related to Rayburn and/or BAJ,[9] (2) that she knew or had notice of any requirement of 100% ownership disclosure on the application, or (3) that she had any intent to defraud the State Police or acted other than in good faith reliance on her father and her attorneys.

b. The Verdict and Motion for Judgment of Acquittal

On June 27, 1997, after a five week trial and seven days of jury deliberation, the jury convicted Fred Goodson and Carl Cleveland of two counts each of mail fraud, in connection with the 1994 and 1995 TSG gaming license renewal applications, and of RICO and RICO conspiracy.

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[8] Whether a less than 5% ownership interest was required to be disclosed in May, 1995, was a matter of some confusion both by regulatory officials and participants in the video poker industry. Not required to be disclosed by statute, the requirement of disclosure of 100% of ownership interests was a recent addition (1995) to the license application forms and instructions. There is no evidence that Maria, who filled out none of the applications she signed, was aware of this subtle change in the application form, which had been revised several times since 1992, requesting in different years disclosure of 5% or more owners (see A.201a), then disclosure of "principal" owners (1993 and 1994), and finally disclosure of "all" owners (1995). Gov't Exhibits 5, 7, 9 and 41.

[9] Presumably that the Rayburn/BAJ transaction was a bribe of defendant former Senator "Sixty" Rayburn. Both Maria and "Sixty" Rayburn were acquitted on all bribery related counts.

The jury convicted Maria Goodson of one count of mail fraud in connection with TSG's 1995 license renewal application, but acquitted her of all the other counts, including the other mail fraud counts, and the RICO and RICO conspiracy counts. Additionally, the jury acquitted Fred Goodson and Cleveland of the first two mail fraud counts, related to the original 1992 TSG gaming license application and its first renewal in 1993, and the illegal gambling count.

Maria Goodson filed a motion for judgment of acquittal on the grounds of insufficiency of the evidence to support her conviction. Despite the scantiness of evidence and implausibility of the alleged Fred Goodson/Carl Cleveland hidden ownership scheme, notably the facts that Fred Goodson underwent suitability investigation and was found suitable, therefore having no reason to hide any alleged ownership interest in TSG, and that Carl Cleveland's failure to file tax returns during an audit would not have been an impediment to his being found suitable for licensing, and despite the significant evidence that the Rayburn agreement did not convey an ownership interest in TSG and that, in any event, at less than 5%, it was not required to be disclosed on TSG's 1995 license application, the District Court found that the evidence supported a jury finding of either or both of the two alleged Count 6 schemes to defraud, (1) failure to disclose the Fred Goodson/Cleveland hidden ownership interests, and (2) failure to disclose the Rayburn/BAJ hidden ownership interest. A.91a. The Court further found the evidence sufficient to support a jury finding of Maria Goodson's guilt, presumably with requisite knowledge of fraudulent scheme and specific intent, for failure to disclose either or both hidden ownership interests, despite the total absence in the record of any evidence of Maria's knowledge of either claimed fraudulent scheme and therefore the virtual impossibility of proof of her specific intent to defraud. A.92a-103a.

c. Forfeiture Proceedings

Following the RICO and RICO conspiracy convictions of Fred Goodson and Carl Cleveland, the government sought forfeiture of their alleged interests in TSG and corporate general partner TSG, Inc. The District Court conducted a forfeiture hearing and subsequently entered a judgment ordering the forfeiture of TSG and TSG, Inc. and certain other assets.

Thereafter, Alex and Maria Goodson, as record owners of TSG and TSG, Inc., filed a petition of intervention in the forfeiture proceedings asserting their ownership interests in the two companies. On February 4, 1998, the District Court conducted an evidentiary hearing on their petition and, on April 15, 1998, denied their claims, ruling that Fred Goodson and Carl Cleveland were the "true owners" of TSG and TSG, Inc., whose ownership interests had been properly forfeited to the government.[10] A.167a-174a.

3. The Fifth Circuit's Opinion

On appeal, the Fifth Circuit rejected petitioner Maria Goodson's contention that an unissued state license is not "property" under the federal mail fraud statute, deeming

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[10] In the original order denying post-verdict motions for judgment of acquittal, the District Court found the evidence sufficient to prove either that Fred Goodson and Carl Cleveland were the true owners of TSG or (inconsistently) that there was an agreement among the parties that entitled them to acquire ownership of TSG at some time in the future when they so chose. A.95a. The District Court's original forfeiture order held that the government had proved beyond a reasonable doubt that Fred Goodson and Carl Cleveland had forfeitable interests in TSG, but did not identify the nature of these interests as either present ownership or expected future ownership. A.168a Fred Goodson and Carl Cleveland were not declared the true owners of TSG until the District Court's decision denying Alex and Maria Goodson's claims of ownership of TSG. A.174a.

itself bound by its earlier opinion in *United States v. Salvatore*, 110 F.2d 1131 (5th Cir. 1997), which had refused to recognize a distinction between issued and unissued licenses and had held that unissued Louisiana video poker licenses constitute "property" under the mail fraud statute. A.19a

The Fifth Circuit also rejected petitioner Maria Goodson's claim that the conflict among the circuits on the "license as property" issue, and the absence of any ruling by the Fifth Circuit on the issue at the time of the acts giving rise to the mail fraud counts in this case,[11] did not give fair notice, as required by due process, that the mail fraud statute proscribed the charged criminal acts. The Fifth Circuit held that the split among the circuits gave the defendants notice that the charged acts ***could be*** proscribed and this was sufficient to meet the fair notice requirement of due process. A.20a.

While the appeal was pending, this Court issued its opinion in *Neder v. United States*, ___ U.S. ___, 119 S. Ct. 1827 (1999), holding, contrary to prior Fifth Circuit law, that materiality is an element of mail fraud. The Fifth Circuit declined to permit supplemental briefing on the issue and shortly thereafter issued its opinion, which does not address *Neder* or materiality as an element of mail fraud.[12]

The Fifth Circuit focused its sufficiency of evidence examination of Maria Goodson's mail fraud conviction on her alleged participation in the scheme to hide "the 4.99% ownership interest held by Benny Rayburn, Jr."[13] The

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[11] The *Salvatore* opinion was not issued until 1997, long after TSG's license applications were submitted to the State Police in 1992-1995.

[12] Appellants also raised the *Neder* issue in their applications for rehearing, but they were denied without comment.

[13] The Court did not address her alleged participation in a scheme to hide the purported hidden ownership interest in TSG

Court concluded that the interest conveyed to Benny Rayburn was an ownership interest in the TSG limited partnership and that this interest was required to be disclosed to the State Police on the 1995 application. In support of its conclusion that the Rayborn interest was an ownership interest in TSG the Court relied on the language in the Benny Rayburn agreement purporting to convey a "4.99% interest out of a 100% interest in the Truck Stop Gaming, Ltd. partnership."[14] and Maria Goodson's statement to the family's accountant, Joe Morgan, identifying check numbers and payees, that BAJ, to whom a check had been issued, "[had] become . . . 4.9 percent partners or whatever A.190a. The Court did not identify the basis of its conclusion that the 4.99% interest was required to be disclosed on the 1995 application.[15] The Court's opinion did not address what evidence there was that Maria was personally aware of any recent change in disclosure requirements at the time she signed the 1995 license renewal application and deliberately, rather than perhaps inadvertently, withheld information about the Rayburn transaction that had occurred many months before. In disregarding the significant evidence in the record that the Rayburn interest was not an ownership interest and that, in any event, at less than 5%, it

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of her father, Fred Goodson, and family attorney, Carl Cleveland.

[14] The opinion leaves out the phrase "on the following terms and conditions, . . . " and doesn't reference at all or acknowledge the limitation on the type of interest conveyed which was expressed in § 4 of the agreement. A.206a.

[15] The District Court had explicitly acknowledged that the "defense presented contradictory evidence that ownership interests of less than 5% did not have to be disclosed" but concluded that "conflicts in the evidence must be resolved in the Government's favor . . . " A.92a. The Court was referring to correspondence from the State Police acknowledging that certain interests of less than 5% did not have to be reported or disclosed to the State Police. A.203a.

may not have been required to be disclosed, as well as the total absence of evidence that Maria Goodson was aware of any fraudulent scheme or of any requirement that the 4.99% Rayburn interest be disclosed to State Police and that she intended to defraud the State Police when she signed TSG's 1995 license renewal application, the Fifth Circuit applied an extremely deferential standard of sufficiency of evidence review. Under the sufficiency standard applied by the Court, "[t]he evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, and the jury [was] free to choose among reasonable constructions of the evidence." A.30a.

Finally, with respect to Alex and Maria Goodson's claim of ownership of TSG, the Fifth Circuit upheld the forfeiture of TSG, "agreeing with the district court's decision not to allow an obviously false partnership agreement to be used to provide the basis for a claim of interest" under the RICO forfeiture statute. The Court found that the District Court had properly disregarded the "sham" partnership agreement, but the Court like the District Court failed to identify any legal principles, either of state or federal law, which justified its treatment of the TSG partnership agreement as a sham having no legal effect in the determination of who owns TSG.

REASONS FOR GRANTING THE WRIT

This petition and the companion petitions of Maria Goodson's co-defendants Fred Goodson and Carl Cleveland, which Maria Goodson adopts and incorporates herein, raise several important and in some respects extremely troubling questions of federal criminal law and procedure.

1. There Is a Square Conflict Among the Circuits on Whether Unissued Government Licenses Constitute "Property" Under the Mail and Wire Fraud Statutes.

The federal courts of appeal are in open disagreement about whether an unissued license in the hands of the state is "property" for purposes of the requirement in the mail and wire fraud statutes that the victim of such frauds be deprived of money or property. The Fifth Circuit's position, that an unissued license is property, while in agreement with that of the the First and Third Circuits,[16] directly conflicts with the position taken by the Second, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits.[17] Maria Goodson was convicted of mail fraud for conduct that would not have violated the mail fraud statute in the majority of the United States. Exposure to conviction of a federal crime should not be an accident of geography. This Court should grant certiorari in order to decide this question and impose national uniformity on the application of this federal law to conduct which presently is a federal crime in only a few states.

Maria Goodson adopts and incorporates the argument on this issue stated in the petition for certiorari filed by her co-defendant Carl Cleveland.

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[16] *United States v. Bucuvalas*, 970 F.2d 937 (1st Cir. 1992); *United States v. Martinez*, 905 F.2d 709 (3rd Cir. 1990); *United States v. Salvatore*, 110 F.3d 1131 (5th Cir. 1997).

[17] *United States v. Evans*, 844 F.2d 36 (2nd Cir. 1988); *United States v. Schwartz*, 924 F.2d 410 (2nd Cir. 1991); *United States v. Novod*, 927 F.2d 726 (2nd Cir. 1991); *United States v. Paccione*, 949 F.2d 1183 (2nd Cir. 1991); *United States v. Murphy*, 836 F.2d 248 (6th Cir. 1988); *Toulubi v. United States*, 875 F.2d 122 (7th Cir. 1989); *United States v. F.J. Vollmer & Co.*, 1 F.3d 1511 (7th Cir. 1993), *cert. denied*, 510 U.S. 1043 (1994); *United States v. Granberry*, 908 F.2d 278 (8th Cir. 1990); *United States v. Blumeyer*, 114 F.3d 758 (8th Cir. 1997); *United States v. Dadanian*, 856 F.2d 1391 (9th Cir. 1988); *United States v. Kato*, 878 F.2d 267 (9th Cir. 1989); *United States v. Schott*, 145 F.3d 1289 (11th Cir. 1998).

In addition it should also be noted that the minority position adopted by the First, Third and Fifth Circuits, that an unissued license constitutes property of the government for purposes of the mail fraud statute, is conceptually flawed, is inconsistent with traditional property law principles, both common law and civilian (Louisiana), and invites the federal government to second guess state regulators and interpret and apply state licensing and regulatory requirements in a manner inconsistent and at odds with the interpretation and application of such laws by the state regulators charged with their enforcement.

First, contrary to the opinions of the Third Circuit in *United States v. Martinez*, 905 F.2d 709, 713-14 (3d Cir. 1990) and the Fifth Circuit in *United States v. Salvatore*, 110 F.3d 1131, 1140 (5th Cir. 1997), the distinction drawn by the majority of circuits between issued and unissued licenses is not "esoteric" or based on "questionable logic" and therefore to be disregarded in attributing to "unissued" licenses the same property characteristics as "issued" licenses. The distinction is the fundamental distinction between existence, including existence in some intangible form, and nonexistence. "Unissued" licenses, like unenacted laws or unissued promissory notes and unincurred debt, are nonexistent and therefore cannot by any stretch of legal concept be characterized as property. In *Carpenter v. United States*, 484 U.S. 19, 108 S. Ct. 316 (1987), this Court recognized that intangible property rights, such as the historically recognized intellectual property interest of a newspaper in informational material it has acquired and plans to publish, can and do constitute property for purposes of the mail fraud statute. Intangibility is not an obstacle to finding a property interest. Nonexistence is.

Second, the state's relationship to "unissued" and issued licenses has none of the characteristics of the relationship between an owner and property under traditional property concepts of civil and common law. Black's

Law Dictionary, Ed. ("More specifically, property is ownership; the unrestricted and exclusive right to a thing; the right to dispose of a thing, in every legal way, to possess it, to use it and to exclude every one else from interfering with it . . . That dominion or indefinite right of use or disposition which one may lawfully exercise over particular things or objects . . . the exclusive right of possessing, enjoying and disposing of a thing . . . The word is also commonly used to denote everything which is the subject of ownership, corporeal and incorporeal, tangible or intangible, visible or invisible, real or personal . . . "); Yiannopoulos, A.N., *Louisiana Civil Law Treatise, Volume 2: Property* (Third Edition) (1991) ("The word is frequently used in the United States to denote indiscriminately objects of patrimonial rights or rights with respect to things."). The State of Louisiana cannot hold, use or exercise license rights to conduct video poker operations with respect to unissued video poker licenses. Its authority is absolutely limited to issuing them and, only with cause, revoking them. These characteristics are indicative of regulatory authority, not ownership. Unissued video poker licenses do not exist, are not susceptible of ownership by the state and therefore cannot be classified as property of any kind.

Third and most important, in terms of warranting consideration by this Court, is the specter of inconsistent enforcement of state licensing regulations by the federal government and state regulators. This case presents a telling example. The State of Louisiana found Fred Goodson suitable for licensing. The state, had it so chosen, could have investigated Carl Cleveland and CBK&C for suitability since the CBK&C loan to the Goodsons was prominently disclosed and subjected the firm and its members to a suitability investigation. Under State Police regulations, Cleveland's failure to have filed income tax returns during the course of an IRS audit would not have been an impediment to suitability for licensing and he had no reason to hide an ownership interest in TSG. The

video poker statute provides criminal sanctions for misrepresentation and fraud (La. Rev. Stat. Ann. 27:309 (formerly La. Rev. Stat. Ann. 33:4862.9)), yet the state has not prosecuted the defendants for violating this statute. It is quite possible that the Louisiana State Police may have been perfectly comfortable and knowledgeable about the ownership structure of TSG and may not have found itself to have been defrauded into issuing and renewing TSG's video poker license. Yet the federal government, like some meddlesome interloper, intervened in TSG's relationship with the state regulators, interpreting the state's requirements in ways perhaps inconsistent with the state's interpretation of the same requirements, and declared, without invitation or concurrence, that the state was the victim of fraud. The use of the mail and wire fraud statutes to police state licensing regulations, ordinarily enforced by the states, is an unwarranted and Congressionally unauthorized affront to the traditional division of responsibility between the states and the federal government embodied in the concept of federalism articulated by this court. See *United States v. Lopez*, 514 U.S. 549 (1995).

2. In Deciding That Defendants Had Fair Notice That Their Acts *Could Be* Proscribed By the Mail Fraud Statute, the Fifth Circuit Applied an Incorrect Standard In Conflict With Relevant Decisions of This Court.

Despite the fact that the Fifth Circuit had not yet ruled on the "unissued license as property" question at the time of Maria Goodson's charged mail fraud offense, the Court of Appeals nonetheless found that the conflict among the circuits on this issue provided Maria Goodson and her co-defendants notice that their conduct *could be* proscribed by the mail fraud statute and that this was sufficient to satisfy the fair notice requirement of due process. A.19a-20a. This Court should grant certiorari to address the question, left open in this Court's recent

decision in *United States v. Lanier*, 520 U.S. 259, 117 S. Ct. 1219 (1997), of whether conflicting court of appeals decisions on the criminality of certain conduct nevertheless provides sufficient warning of possible criminality to meet the fair notice requirement of due process.

In *Lanier*, this Court held that prior judicial decisions can give fair warning of criminality sufficient to meet the fair notice requirement of due process of such decisions make the unlawfulness of certain acts "apparent." The Court however expressly left open the question of whether and under what circumstances "disparate decisions in various Circuits might leave the law insufficiently certain even on a point widely considered" to meet the fair notice requirement of due process. 520 U.S. at 269. The Court in *Lanier* was concerned with what constitutional rights are sufficiently clearly established to make their violation the subject of criminal liability. The Court, in its analysis, analogized the fair notice requirement of criminal law with the "clearly established" rule for putting public officials on notice that their actions might expose them to civil liability for violating "clearly established" constitutional rights. Notably, this Court in its recent decision in *Wilson v. Layne*, ___ U.S. ___, 119 S. Ct. 1692 (1999), relieved government defendants of civil liability for their actions, in part on the basis that a split among several circuits indicated that the defendants did not have sufficient notice that they were violating a known constitutional right. "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." 119 S. Ct. at 1701. Even more, so is it unfair to subject an individual to criminal liability for violating the mail fraud statute for an action that a majority of federal appeals court judges have held not to be the crime of mail fraud.

3. The Fifth Circuit's Decision Must Be Vacated and Remanded for Reconsideration in Light of This Court's Recent Holding in *Neder v. United States.*

The jury in this case was not instructed that materiality is a required element of mail fraud, as this Court recently ruled in *Neder v. United States*, ___ U.S. ___, 119 S. Ct. 1827 (1999), which was decided while Maria Goodson's appeal was pending and was not considered by the Fifth Circuit. In light of the likelihood that the jury in this case may not have found the allegedly fraudulent failure of Maria Goodson to disclose the 4.99% Benny Rayburn interest on the 1995 TSG license renewal application to be material, the decision below must be vacated and remanded for consideration in light of *Neder*.

The Louisiana video poker statute required and still requires that all owners with 5% or more interest in a gaming license meet suitability requirements. Even if it is assumed, for the sake of argument, that the Rayburn interest was an ownership interest, it fell below the threshhold for which suitability investigation and qualification were required in order to maintain a license. A properly instructed jury, cognizant of the materiality requirement of the mail fraud statute, may very well have concluded that Maria Goodson's failure to disclose the Rayburn interest to the State Police was not material to TSG's retention of its video poker license.

Maria Goodson adopts and incorporates the arguments on this issue stated in the petitions for certiorari filed by her co-defendants Carl Cleveland and Fred Goodson.

In addition, it should be noted that, under the standard for sufficiency of evidence articulated by this Court in *Jackson v. Virginia*, 443 U.S. 307 (1979), sufficiency of evidence is a due process requirement and a reviewing court must determine, regardless of the jury's verdict, and regardless of the adequacy and accuracy of jury instructions, whether the record evidence can rationally support a finding of guilt beyond a reasonable doubt

with respect to each and every element of the charged offense. 443 U.S. at 317-318. In *Neder,* this Court held that materiality is one of the elements of mail fraud. The sufficiency of evidence with regard to this element is highly questionable. The record does not support a rational finding of proof beyond a reasonable doubt of the materiality of the alleged falsehoods on which Maria Goodson's conviction was based. The falsehoods alleged in this case, including the failure to disclose a 4.99% interest which, if required to be disclosed, fell below the 5% threshold considered by the State Police in determining suitability for a license, present a materiality issue which, on the present record, may not have been proven beyond a reasonable doubt. Neither the District Court nor the Fifth Circuit examined the sufficiency of evidence to prove materiality of the falsehoods charged. This case should be remanded, therefore, for such consideration.

4. The Fifth Circuit's Decision Presents the Important Question of What Is the Proper Application of the Reasonable Doubt Standard By a Court Reviewing the Sufficiency of Circumstantial Evidence to Support a Guilty Verdict.

In reviewing the sufficiency of the evidence to convict Maria Goodson of mail fraud, which consisted exclusively of circumstantial evidence, both the District Court and the Court of Appeals applied a sufficiency of evidence standard explicitly deferential to the jury's guilty verdict. Under this standard, circumstantial evidence "need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, and the jury is free to choose among reasonable constructions of the evidence." A.30a, A.87a-89a. Applying this deferential standard, both the District Court and the Fifth Circuit disregarded certain probative evidence in the record, notably evidence from the State Police that indicated that certain interests less

than 5% were not required to be disclosed.[18] A.203a. This evidence was not however the sort of evidence that could have been properly discounted or disregarded by the jury on credibility or reliability grounds. Additionally, both the District Court and the Court of Appeals disregarded those provisions of the Benny Rayburn agreement that strongly indicated that it was not intended and did not in fact convey an ownership interest in TSG to Benny Rayburn. These two pieces of evidence alone strongly demonstrate the existence of a reasonable hypothesis of innocence, especially when coupled with the total absence of any evidence that Maria Goodson had any knowledge of a Rayburn-related fraudulent scheme or was aware of the State Police disclosure requirements and deliberately violated them in furtherance of a fraudulent scheme. Maria Goodson may have been convicted of mail fraud for failing to disclose information that was not in fact required to be disclosed. The evidence in the record, taken as a whole, is completely consistent with this hypothesis of Maria Goodson's innocence.

While a jury is entitled to make reasonable inferences from circumstantial evidence, it is the job of the courts, both at the district and appellate levels, to determine whether such inferences are rational and support a finding of proof of guilt of each element of a charged offense beyond a reasonable doubt. That was the point of this Court's decision in *Jackson v. Virginia, supra,* to impose upon the courts a duty to safeguard a criminal defendant's due process right to be convicted only upon proof of each element of a charged offense beyond a reasonable doubt. This court, in *Jackson v. Virginia,* formulated a sufficiency of evidence review standard that was meant to foster meaningful application of the reasonable doubt

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[18] The District Court's dismissal of this evidence was explicit, and was done on the basis that all conflicts in the evidence must be resolved in favor of the government. A.92a-93a.

standard by courts reviewing the sufficiency of evidence to support jury verdicts, without intruding on the jury's function of resolving fact questions, assessing credibility of witnesses and weighing conflicting evidence.

However, this Court's formulation of the sufficiency of evidence standard has been significantly diluted in the lower federal courts by the juxtaposition of the *Jackson v. Virginia* standard with certain interpretive glosses, such as the formulation recited by the Fifth Circuit in this case – that the evidence "need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, and that the jury is free to choose among reasonable constructions of the evidence." How is proof achieved beyond a reasonable doubt, if the evidence also supports a reasonable hypothesis of innocence? Should the jury be able to pick and choose between two reasonable constructions of the evidence, one pointing to guilt and one pointing to innocence? Doesn't this on its face violate the reasonable doubt standard?

Many states have historically had a rule of evidence which provides that if a conviction is to be based on circumstantial evidence, such evidence must exclude every reasonable hypothesis of innocence. See, La. Rev. Stat. Ann. 15:438; *State v. Wright*, 445 So.2d 1198 (La. 1984). This rule predates the acknowledgement by this Court in *In re Winship*, 397 U.S. 358 (1970) and its implementation through sufficiency of evidence review required by *Jackson v. Virginia*, that the reasonable doubt burden of proof is imposed in criminal cases by the due process clause. The rule has served as a useful tool for enforcing the reasonable doubt standard in circumstantial evidence cases, and since *Jackson v. Virginia*, has been incorporated in some states as a part of the *Jackson v. Virginia* sufficiency standard. *State v. Tong*, 609 So.2d 822; *State v. Wright*, *supra*. There are presently seventeen states in which a district court or an appellate court reviewing the sufficiency of evidence to support a jury verdict must find that the jury reasonably found that the evidence supporting its verdict

in cases based on circumstantial evidence excluded every reasonable hypothesis of innocence.[19]

For example the Louisiana Supreme Court has stated:

> "The lynchpin of the Jackson [v. Virginia] standard is rationality. (Citation omitted.) When the case involves circumstantial evidence, a trier-of-fact must reasonably reject the hypothesis of

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[19] These states are **Alabama**: *Ex Parte Smiley*, 655 So.2d 1091 (Ala. 1995); **Arkansas**: *Kendrick v. State*, 823 S.W.2d 931 (Ark.App. 1992), *Ward v. State*, 816 S.W.2d 173 (Ark. App. 1991); **Connecticut**: *State v. Carpenter*, 570 A.2d 203 (Conn. 1990), *State v. Little*, 485 A.2d 913 (Conn. 1984); **Florida**: *Kirkland v. State*, 684 So.2d 732 (Fla. 1996), *State v. Law*, 559 So.2d 187 (Fla. 1989); **Georgia**: *Brown v. State*, 391 S.E.2d 108 (Ga. 1990); **Louisiana**: *State v. Tong*, 609 So.2d 822 (La. 1992), *State v. Wright*, 445 So.2d 1198 (La. 1984), *State v. Chism*, 436 So.2d 464 (La. 1983); **Maryland**: *Denson v. State*, 628 A.2d 182 (1993), *Hebron v. State*, 627 A.2d 1029 (Md. 1993), *Oken v. State*, 612 A.2d 258 (Md. 1992), *Wilson v. State*, 573 A.2d 831 (Md. 1990); **Minnesota**: *State v. Thomas*, 590 N.W.2d 755 (Minn. 1999), *State v. Moore*, 481 N.W.2d 355 (Minn. 1992), *State v. Ashby*, 567 N.W.2d 21 (Minn. 1997), *State v. Bias*, 419 N.W.2d 480 (Minn. 1988), *State v. Wahlberg*, 296 N.W.2d 408 (Minn. 1980); **Mississippi**: *McRee v. State*, 732 So.2d 246 (Miss. 1999), *Fisher v. State*, 481 So.2d 203 (Miss. 1985); **Montana**: *State v. Lucero*, 693 P.2d 511 (Mont. 1984), *State v. Fitzpatrick*, 516 P.2d 605 (Mont. 1973); **New Hampshire** *State v. Alexander*, 723 A.2d 22 (N.H. 1998), *State v. Tarantino*, 668 A.2d 45 (N.H. 1995), *State v. Newcomb*, 663 A.2d 613 (N.H. 1995); **New Mexico**: *State v. Vigil*, 794 P.2d 7238 (N.M. 1995); **New York**: *People v. Schepis*, 614 N.Y.S.2d 719, 645 N.E.2d 1227 (1994), *People v. Parke*, 595 N.Y.S.2d 163, 622 N.E.2d 322 (1993), *State v. Marin*, 492 N.Y.S.2d 16, 481 N.E.2d 556 (1985); **Oklahoma**: *Hooper v. State*, 947 P.2d 1090 (Okla. 1997), *Cheatham v. State*, 900 P.2d 414 (Okla. 1995), *White v. State*, 900 P.2d 982 (Okla. 1995); **Pennsylvania**: *Commonwealth v. Trafford*, 459 A.2d 373 (Pa. 1983), *Commonwealth v. Scott*, 597 A.2d 1220 (Pa. 1991); **South Dakota**: *State v. White*, 538 N.W.2d 237 (S.D. 1995); **Tennessee**: *State v. Wilson*, 924 S.W.2d 648 (Tenn. 1996); **Utah**: *State v. Hill*, 727 P.2d 221 (Utah 1986); and **Virginia**: *Hickson v. Commonwealth*, 520 S.E.2d 643 (Va. 1999).

> innocence advanced by the defendant before a reviewing court may determine, after considering all of the evidence in the light most favorable to the prosecution, but the state's case excluded any other reasonable hypothesis of innocence and thereby supported the jury's verdict. (Citation omitted.)" *State v. Tong, supra.*
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> "This Court has recognized that R.S. 15:438 is not a purely separate test from the Jackson [v. Virginia] standard to be applied instead of a sufficiency of the evidence test whenever circumstantial evidence forms the basis for the conviction. (Citation omitted.) . . . R.S. 15:438 provides an evidentiary guideline for the jury when considering circumstantial evidence and facilitates appellate review of whether a rational juror could have found a defendant guilty beyond a reasonable doubt. Exclusion of every reasonable hypothesis of innocence is therefore a component of the more comprehensive reasonable doubt standard, where circumstantial evidence is used to convict." *State v. Wright, supra.*

In contrast, all of the federal courts of appeals and the rest of the state courts have abandoned the circumstantial evidence rule requiring the exclusion of reasonable hypotheses of innocence.[20] Ironically, they have done so in misplaced reliance on a portion of this court's language in

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[20] See for example, *United States v. Loder,* 23 F.3d 586 (1st Cir. 1994); *United States v. Mullen,* 183 F.2d 122 (2nd Cir. 1999); *United States v. Dent,* 149 F.3d 180 (3rd Cir. 1998); *United States v. Jackson,* 863 F.2d 1168 (4th Cir. 1989); *United States v. Bell,* 678 F.2d 547 (5th Cir. 1982); *United States v. Fortson,* 194 F.3d 730 (6th Cir. 1999); *United States v. Robinson,* 161 F.2d 463 (7th Cir. 1998); *United States v. Cudjo,* 195 F.3d 420 (8th Cir. 1999); *United States v. Talbert,* 710 F.2d 528 (9th Cir. 1983); *United States v. Fabio,* 790 F.2d 1489 (10th Cir. 1986); *United States v. Sepulveda,* 115 F.3d 882 (11th Cir. 1997). See also, Gregory, R.J., "Whose Reasonable Doubt? Reconsidering the Appropriate Role of the Reviewing Court in the Criminal Decision Making Process," *24 American Criminal Law Review* 911 (1987).

Jackson v. Virginia or *Holland v. United States*, 348 U.S. 121 (1954) or both. In *Jackson v. Virginia*, after reviewing carefully all of the circumstantial evidence with respect to the question of defendant's intent to kill the victim, this court found that the defendant's claim of self-defense would have required the trial judge to draw a series of improbable inferences from the basic facts" and "only under a theory that the prosecution was under an affirmative duty to rule out every hypothesis except that of guilt beyond a reasonable doubt could this petitioner's challenge be sustained." The Court cited *Holland* for the proposition that it had rejected such theory in the past. Like the *Jackson v. Virginia* opinion, this Court's decision in *Holland* rejected the notion that in proving guilt on the basis of circumstantial evidence the government must negate every possible theory of innocence.[21]

There is, however, a critical difference between the requirement that the evidence negate every conceivable hypothesis of innocence and the requirement that it negate every reasonable hypothesis of innocence. This Court's statements in *Jackson v. Virginia* and *Holland* are a far cry from the proposition that a guilty verdict still meets the reasonable doubt standard even though the evidence supports a reasonable hypothesis of innocence. Yet this is the present standard in all of the federal circuits and most state courts, in purported but erroneous reliance on *Jackson v. Virginia* and *Holland*. The deferential federal standard, especially when coupled with the proposition, as espoused by the fifth Circuit, including the instant case, that the jury is free to pick and choose among the evidence and can freely disregard certain evidence, such as, in the instant

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[21] *Holland* did hold that the jury was not required to be instructed that circumstantial evidence must exclude every reasonable hypothesis of innocence, so long as the jury is properly instructed on the reasonable doubt standard.

case, the State Police statements that interests less than 5% were not required to be disclosed, makes somewhat of a mockery of sufficiency of the evidence review applying the reasonable doubt standard.

This Court should grant certiorari to determine whether in cases based on circumstantial evidence, the requirement that the evidence exclude reasonable hypothesis of innocence, or some other methodology for testing the sufficiency of the evidence is necessary to assure that the standard of proof beyond a reasonable doubt is effectively preserved by reviewing courts through sufficiency of evidence review of jury verdicts. The price of a lax and deferential standard of sufficiency of evidence review is the risk that defendants like Maria Goodson, possibly innocent, may be convicted of crimes they did not commit.

5. This Court Should Decide the Question of Whether, In a Criminal RICO Forfeiture Proceeding, the Court Must Apply State Law to Determine If a Third Party Has the Requisite Vested or Superior "Right, Title and Interest" in Forfeited Property to Defeat Its Forfeiture to the Government.

This Court should decide whether district courts can disregard otherwise applicable state law in determining whether a third party has the requisite vested or superior "right, title and interest" in forfeited property to defeat its forfeiture to the government.

Although this court has not so ruled, lower courts have held that in a federal criminal forfeiture action, ownership interests are defined by state law and the federal forfeiture statutes determine whether the property interests, as so defined, must be forfeited to the government. *United States v. 1977 Porsche Carrere, supra* at 34; *United States v. East Carroll Correctional Systems, Inc.*, 1998 WL 480663 (W.D. La. 1998); *County of Oakland v. Vista Disposal, Inc.*, 826 F.Supp. 218 (E.D. Mich. 1993). Because there is no general federal common law of property, a district court

should be required to employ applicable state law principles when deciding the nature of an affected party's property interest in criminally forfeited property. *County of Oakland v. Vista Disposal, Inc., supra* at 223.

The Fifth Circuit held that, because of the alleged fraud perpetrated by the defendants, the TSG partnership agreement must be disregarded in determining the ownership of TSG. Those provisions of Louisiana law which permit the use of parole evidence to vary the terms of a written agreement do not support the government's claim and the court's conclusion that the TSG partnership agreement can be disregarded in determining the ownership of TSG. For example, Louisiana Civil Code article 1848 permits the use of parole evidence to negate the terms of a written agreement in cases of fraud or simulation. The problem of asserting fraud or simulation to justify disregarding the written partnership agreement is that under Louisiana law, in either case, it is necessary that a party or the parties to the written contract be a party to or at least know about the fraud or simulated agreement. There is no evidence at all that either Maria or Alex Goodson knew of the alleged fraudulent scheme or believed their execution of the partnership documents represented a simulation. FT., pp. 31-33, 59-66. Although Louisiana Civil Code article 1956 recognizes that fraud committed by a third party can vitiate a written contract, it can only do so if at least one party to the contract knew or should have known about the fraud. Thus, even if there was some secret agreement between Fred Goodson and Carl Cleveland, unless either Alex or Maria Goodson was aware of such secret agreement, the written partnership agreement stands as the only legally acceptable evidence of the ownership of the TSG limited partnership. The lack of knowledge by Maria and Alex Goodson of any alleged fraudulent scheme should have prevented the Fifth Circuit and the District Court from disregarding the written partnership agreement, consensually executed by the two of them, as the definitive evidence of ownership of the TSG partnership.

Under the RICO statute, third parties are given an opportunity to challenge a forfeiture order if they can assert that they have a "legal right, title and interest" in property which has been ordered forfeited. 18 U.S.C. § 1963(1)(2). Further, Congress intended that as far as § 1963(1) is concerned, a third party's claim is to be measured not as it might appear at the time of litigation but rather as it existed at the time the illegal acts were committed which gave rise to the forfeiture. *United States v. BCCI Holdings (Luxemburg)*, 46 F.3d 1185 (D.C. Cir. 1995), *cert. denied sub.nom. Chawla v. United States*, 515 U.S. 1160, 115 S. Ct. 2613 (1995). In the present case, Alex and Maria Goodson's ownership interests in TSG were acquired upon execution and registry of the partnership agreement in February, 1992, prior to the occurrence of any of the alleged RICO offenses giving rise to the forfeiture. Their interest therefore was "vested" and "superior" within the meaning of § 1963(1)(6)(A) and should not have been forfeited.

This Court should grant certiorari to decide what law is applicable to determining property rights of third parties not convicted of any crime giving rise to forfeiture under the RICO statute.

CONCLUSION

For the reasons stated the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES OF AMERICA,
Plaintiff-Appellee-Cross-Appellant,

v.

LARRY S. BANKSTON; MARIA F. GOODSON,
Defendants-Appellants-Cross-Appellees,

CARL W. CLEVELAND; FRED H. GOODSON,
Defendants-Appellants.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARIA F. GOODSON,
Defendant-Appellant,

ALEXANDROS F. GOODSON; TRUCK STOP GAMING LTD.,
Intervenors-Appellants.

Nos. 97-31057, 98-30471.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

July 21, 1999.

Stephen A. Higginson, Asst. U.S. Atty., New Orleans, LA, for United States.

Lewis O. Unglesby, Karl J. Koch, Unglesby & Koch, Baton Rouge, LA, for Bankston.

William H. Jeffress, Jr., Paul Francis Enzinna, Miller, Cassidy, Larroca & Lewin, Washington, DC, for Goodson.

Paul Mogin, Robert B. Barnett, Joseph G. Petrosinelli, Williams & Connolly, Washington, DC, Anthony J. Marabella, Jr., Baton Rouge, LA, for Cleveland.

Katherine G. Wheeler, Steffes & Macmurdo, Baton Rouge, LA, Richard George Crane, Nashville, TN, for Goodson.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before KING, Chief Judge, and REAVLEY and BENAVIDES, Circuit Judges.

BENAVIDES, Circuit Judge:

Larry Bankston ("Bankston"), Fred Goodson, Maria Goodson, and Carl Cleveland ("Cleveland") appeal from their June 27, 1997, convictions and October 15, 1997, sentences for various offenses related to criminal activity in the Louisiana video poker industry. Fred Goodson and Cleveland, along with Alex Goodson, Maria Goodson, and Truck Stop Gaming, Inc. ("TSG, Inc."), additionally appeal the district court's judgment of forfeiture of Truck Stop Gaming, Ltd. ("TSG, Ltd.") and TSG, Inc. as part of the RICO enterprise. The Government cross-appeals, challenging the district court's calculation of both Bankston's and Maria Goodson's sentences. For the reasons set forth below, we affirm the Appellants' convictions and sentences and the forfeiture of TSG, Ltd. and TSG, Inc.

I. Background

Fred Goodson and his family had been in the truck stop business in Slidell, Louisiana for 20 years. In early 1992, the Goodson family formed TSG, Ltd. and its corporate partner, TSG, Inc., in order to participate in the video poker business at their Slidell truck stop. Fred Goodson

and Carl Cleveland's law firm Cleveland, Barrios, Kingsdorf & Casteix ("CBK&C"), loaned Goodson's adult children, Alex and Maria, the start-up capital for TSG, Ltd.[1] With the legal assistance of CBK&C, a partnership *in commendam* was established. Alex and Maria each owned 49% of TSG, Ltd. as limited partners.[2] TSG, Inc. owned the remaining 2% as general partner.[3] Fred Goodson managed TSG, Ltd.

CBK&C also helped the Goodsons prepare and submit to the Louisiana State Police applications for an owner/operator's gaming license for TSG, Ltd. The gaming applications required partnerships seeking a license to identify their partners, to submit personal financial statements for all partners, and to affirm that the listed partners were the sole beneficial owners, that no partner had an arrangement to hold his interest as "an agent, nominee or otherwise," or a present intention to transfer any interest in the partnership at a future time. The initial application submitted on behalf of TSG, Ltd. identified Maria and Alex Goodson as the limited partners and TSG, Inc. as the general partner. The application listed no other persons or entities as having any ownership interest in TSG, Ltd. The initial license application did disclose, however, that Fred Goodson and CBK&C had loaned Maria and Alex all initial capital. That same application also identified Fred Goodson as general manager of the

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[1] Those loans were secured by promissory notes, payable on demand, with 10% annual interest.

[2] TSG, Ltd.'s Agreement of Partnership was signed by Alex and Maria and filed with the Louisiana Secretary of State.

[3] Alex and Maria owned equal shares of TSG, Inc.

business. TSG, Ltd. submitted renewal applications in 1993, 1994, and 1995, which also listed no additional ownership interests.[4]

In 1994, as a part of an unrelated federal investigation of alleged corruption involving Louisiana legislators, the F.B.I. obtained court authorization to conduct electronic surveillance of the office of Louisiana State Senator Larry Bankston. The authorization was based on a series of consensually recorded conversations that took place in September and October 1994 between Bankston and Robert Miller, a cooperating witness. According to the FBI, the Bankston-Miller conversations indicated that Bankston was engaged in a scheme to extort an interest in a casino proposed by the Jena Choctaw tribe, in exchange for his influence in ensuring government approval of the casino.

During the course of its electronic surveillance – limited to the interception of communications concerning the alleged Jena Choctaw scheme – the FBI recorded a conversation between Bankston and Fred Goodson. In that conversation, the two men discussed, in detail, Goodson's truck stop business. Neither man mentioned the Jena Choctaw scheme. Approximately 20 minutes into their discussion, Goodson broached the subject that would form the basis for the present multi-party, multi-count indictment. Armed with the recording of Bankston

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[4] In August 1994, Maria Goodson executed a "Sale of Partnership Interest and Pledge Agreement," which conveyed to Benny Rayburn, the adult son of co-defendant Benjamin "Sixty" Rayburn, a 4.99% interest in TSG, Ltd. Rayburn's 4.99% interest was not disclosed in any renewal application.

and Goodson's 44-minute conversation, the FBI obtained court authorization for electronic surveillance on Goodson's home and businesses.

On October 4, 1996, the Government charged now former Louisiana State Senators Benjamin "Sixty" Rayburn and Larry Bankston; video poker entrepreneur Fred Goodson; his daughter, Maria Goodson; family attorney, Carl Cleveland; and the family's accountant, Joe Morgan, with a combination of racketeering, racketeering conspiracy, mail fraud, conducting an illegal gambling business, money laundering, tax conspiracy, false declaration under penalty of perjury, aiding and abetting a false declaration under penalty of perjury, and interstate communications in aid of racketeering.[5] Most of the charges against the Goodsons, Cleveland, and Joe Morgan related to the establishment, licensing, and operation of TSG, Ltd. The Government alleged that the defendants had schemed to defraud state regulators in obtaining video poker licenses for TSG, Ltd., and to obtain favorable legislation affecting Louisiana's video poker industry. Specifically, the Government alleged that the defendants obtained a gaming license for TSG, Ltd. in 1992 and renewed it in 1993, 1994, and 1995, by fraudulently concealing the identity of the true owners of the company, Fred Goodson and Carl Cleveland.[6] According to the

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[5] The Government did not indict Fred Goodson's son, Alex Goodson, but subsequently named him an unindicted co-conspirator. Alex Goodson joins the instant action as an intervenor in the forfeiture proceedings.

[6] Alex and Maria Goodson were from inception and remain the record owners of TSG, Ltd. and its corporate general partner, TSG, Inc.

Government, Goodson and Cleveland concealed their ownership in order to avoid the probing inquiry of the State's suitability assessment.

Trial commenced on May 12, 1997, and lasted six weeks. Following more than seven days of deliberation, the jury returned a mixed verdict, finding four of the defendants – Carl Cleveland, Fred Goodson, Maria Goodson, and Larry Bankston – guilty of certain counts.[7] The jury acquitted the remaining two defendants – Senator Rayburn and Joe Morgan – on all counts.

On October 15, 1997, the district court sentenced the four convicted defendants. Both Cleveland and Fred Goodson received terms of imprisonment of 121 months. Maria Goodson received a six-month term of imprisonment to be followed by six months of home detention. Bankston received a 41-month term of imprisonment and a fine of $20,000.

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[7] Cleveland was convicted on one count of RICO, one count of RICO conspiracy, two counts of mail fraud (in connection with the 1994 and 1995 TSG, Ltd. gaming license renewal applications), four counts of money laundering, one count of tax conspiracy, and one count of aiding and abetting the filing of a false tax return. Like Cleveland, Fred Goodson was convicted of one count of RICO, one count of RICO conspiracy, and two counts of mail fraud (in connection with the 1994 and 1995 TSG, Ltd. gaming license renewal applications). The jury additionally convicted Goodson of five counts of money laundering and three counts of the use of interstate communications in aid of state bribery. His daughter, Maria, was found guilty of one count of mail fraud in connection with TSG, Ltd.'s 1995 license renewal application. Former Senator Bankston was found guilty of two counts of committing and/or aiding and abetting interstate communications in aid of racketeering.

The defendants filed timely notices of appeal as to their convictions and sentences. On November 14, 1997, the Government filed a notice of cross-appeal relating to the sentences of Bankston and Maria Goodson.

Following Fred Goodson's and Carl Cleveland's convictions for RICO and RICO conspiracy, the Government sought forfeiture of, *inter alia*, their alleged interests in TSG, Ltd. and TSG, Inc. On August 26, 1997, the district court entered a judgment ordering the forfeiture of TSG, Ltd. and TSG, Inc. The district court noted that the jury's verdict and the evidence in the criminal trial record proved beyond a reasonable doubt that Goodson and Cleveland had an interest in TSG, Ltd. and TSG, Inc. and that those entities were part of the RICO enterprise. On October 21, 1997, the district court entered the final order of forfeiture.

On October 31, 1997, Alex and Maria Goodson, as record owners of TSG, Ltd. and TSG, Inc., filed separate petitions of intervention in the forfeiture proceedings, asserting their ownership interests in the two companies. On February 4, 1998, the district court conducted an evidentiary hearing on their petitions, and on April 15, 1998, the district court denied their claims. The district court ruled that Fred Goodson and Carl Cleveland were the "true owners" of TSG, Ltd. and TSG, Inc. and that their ownership interests had been properly forfeited to the Government. Alex and Maria Goodson and TSG, Inc. appeal from that ruling.

II. Discussion

A. Wiretap Evidence

1. Application Omissions

Fred Goodson and Larry Bankston argue that the district court erred in refusing to suppress the evidence obtained from the Bankston wiretap. Both appellants additionally argue that the district court erred in denying their request for an evidentiary hearing pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

Before trial, Bankston filed a motion to suppress the wiretap evidence. Fred Goodson, Maria Goodson, and Carl Cleveland joined the motion.[8] Bankston contended that the November 25, 1994, affidavit completed by Agent Jones in support of the wiretap application contained fatal omissions and misrepresentations. His motion described an "exculpatory" conversation between Bankston and Miller that had been omitted from the wiretap application and claimed that the FBI told Miller to stop recording after that conversation. Bankston asserted that the false statements and/or omissions were deliberately or recklessly made. He accompanied his motion with an offer of proof including affidavits and sworn testimony.

The district court, after hearing arguments by counsel and reviewing submissions, denied Bankston's

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[8] On appeal, Maria Goodson and Carl Cleveland cross-incorporate Fred Goodson and Bankston's suppression arguments. However, neither Maria nor Cleveland meets our standing requirements as articulated in *United States v. Scasino*, 513 F.2d 47 (5th Cir.1975). Because we conclude that the district court did not err in admitting the wiretap evidence, we need not consider Cleveland's argument that he has standing despite *Scasino*.

request for a *Franks* evidentiary hearing. The court found that Bankston had failed to make the requisite showing that the affiant, Agent Jones, had intentionally misled the District Court and tricked the Court into issuing the wiretap authorization and that the omissions were material such that they negated probable cause.

We review de novo the denial of a *Franks v. Delaware* evidentiary hearing. *See United States v. Dickey*, 102 F.3d 157, 162 (5th Cir.1996) (reviewing the denial of a Franks hearing in the context of a search warrant); *United States v. Guerra-Marez*, 928 F.2d 665, 671 (5th Cir.1991) (applying the *Franks* standard and reviewing de novo the decision of the district court to validate a wiretap order). In *Franks v. Delaware*, the Supreme Court held that a defendant is entitled to an evidentiary hearing to contest the validity of a search warrant if he makes a substantial preliminary showing that (1) allegations in a supporting affidavit were a deliberate falsehood or made with a reckless disregard for the truth and (2) the remaining portion of the affidavit is not sufficient to support a finding of probable cause. *See Franks*, 438 U.S. 154, 171, 98 S.Ct. 2674, 2684, 57 L.Ed.2d 667 (1978). We have explained that "even if the defendant makes a showing of deliberate falsity or reckless disregard for the truth by law enforcement officers, he is not entitled to a hearing if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause." *United States v. Privette*, 947 F.2d 1259, 1261 (5th Cir.1991) (quoting *Franks*, 438 U.S. at 171-72, 98 S.Ct. at 2684-85).

We have applied *Franks* to instances of omission where, as here, an affidavit falls squarely within the

dictates of 18 U.S.C. § 2518. *United States v. Tomblin*, 46 F.3d 1369, 1377 (5th Cir.1995) (noting that "[o]missions or misrepresentations can constitute improper government behavior"). In such cases of omitted information, the logic of *Privette* holds firm: a defendant is not entitled to an evidentiary hearing if a wiretap authorization would lawfully have issued after correcting the supporting affidavit by supplying any material omissions. Therefore, in determining whether Fred Goodson and Bankston were improperly denied an evidentiary hearing on their motion to suppress, we need only consider Agent Jones's affidavit – corrected to contain the allegedly exculpatory conversation – and determine whether that reconstructed affidavit satisfies the wiretap requirements contained in 18 U.S.C. § 2518.

If the Jones affidavit were revised to include the omitted information, the affidavit would describe conversations suggesting that between September 19 and October 31, 1994, the cooperating witness, Miller, and Bankston had discussed a scheme to exchange Bankston's influence for an ownership interest in the Jena Choctaw casino. In particular, the affidavit would reveal that Bankston had met with Jena Choctaw Chief Jackson several times, had agreed to provide the Jena Choctaw tribe with "political cover," and had been telephoned frequently by Chief Jackson. The affidavit would also state that, in a sixth conversation with Miller on October 31, 1994, Bankston had declared that he was "fini" and that his present intention was "to stay away from . . . this entire thing." The affidavit would additionally include statements made by Bankston to Miller at the conclusion of that October 31, 1994, conversation expressing Bankston's

"willing[ness] to proceed" with the project if "something could be worked out to his satisfaction."

a. Probable Cause

An application for a wiretap must demonstrate probable cause to believe that the target has committed, is committing, or will commit a crime, as well as "probable cause for belief that particular communications concerning that offense will be obtained through such interception." 18 U.S.C. § 2518(3)(a)-(b). We evaluate probable cause utilizing a totality-of-the-circumstances test. *See Dickey*, 102 F.3d at 162. In light of Miller's multiple statements to the FBI that Bankston was negotiating a deal in which he would extort an undisclosed interest in the Jena Choctaw casino, the multiple taped conversations containing statements that corroborated this tip from Miller, and the ambiguity of any exculpatory statements in the October 31 conversation, we find that the reconstructed affidavit would establish sufficient probable cause to authorize electronic surveillance on November 25.[9]

b. Necessity

Bankston and Goodson also argue that the application failed to meet the dictates of 18 U.S.C. § 2518(3)(c),

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[9] Our finding of probable cause includes a finding that "particular communications" concerning that offense would have been "obtained through such interception." *See* 18 U.S.C. § 2518(3)(b). The October 31, 1994, conversation between Miller and Bankston in no way undermines probable cause to believe that Bankston would have committed the Jena Choctaw scheme and that particular communications concerning the scheme would occur either in Bankston's office or on his phone.

which requires the Government to show and the issuing judge to find that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. § 2518(3)(c). The Government "need not prove exhaustion of every conceivable option before a wiretap order may issue." *Guerra-Marez*, 928 F.2d at 671.

Here, the FBI included in its 21-page wiretap application a detailed account of the investigative techniques it had employed in making its case against Bankston. Agent Jones stated in his November 25, 1994, affidavit that the use of electronic surveillance was necessary because Bankston had made it clear to Miller that he would not include him in any potentially incriminating conversations with third parties.[10]

We have affirmed wiretap orders based upon similar affidavits. *See, e.g., United States v. Krout*, 66 F.3d 1420, 1425 (5th Cir.1995) (explaining that the informants or undercover agents could not infiltrate the conspiracy at high enough levels); *United States v. Collins*, 972 F.2d 1385, 1412 (5th Cir.1992) (noting that consensual monitoring would be impossible, as it was unlikely that the informant would be present during the illegal activity). Agent Jones's affidavit provides sufficient information to meet

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[10] In his talks with Miller, Bankston had alluded to conversations that he would be having with his stockholder nominee as well as other people in Louisiana whom he had to satisfy out of his five-percent hidden ownership interest in the Jena Choctaw casino.

the requirements of § 2518(3)(c). The omission of the October 31 conversation does not impact our finding of "necessity," nor does the fact that the FBI failed to inform the issuing court that Miller had been told to cease recording his conversations with Bankston. Regardless of whether Miller continued to record his conversations with Bankston, Miller was unlikely to be present during the talks between Bankston and his Louisiana contacts. Therefore, a need for electronic surveillance existed.

2. Minimization

Bankston and Fred Goodson contest the district court's factual finding that the FBI properly minimized the interception of communications outside the scope of the wiretap order. In particular, Bankston and Goodson dispute the interception of their December 1994 conversation, which included no mention of the Jena Choctaw tribe casino scheme and did not broach the subject of criminal activity until approximately twenty minutes into the conversation. We review determinations of the reasonableness of minimization efforts for clear error. *See United States v. Wilson*, 77 F.3d 105, 112 (5th Cir.1996).

Section 2518 implements "the constitutional mandate . . . that wiretapping must be conducted with particularity," *United States v. Daly*, 535 F.2d 434, 440 (8th Cir.1976) (citation omitted), by requiring electronic surveillance to "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception." 18 U.S.C. § 2518(5). The Government's efforts to minimize nonrelevant conversations must be "objectively reasonable" in light of the circumstances

confronting the interceptor. *Scott v. United States*, 436 U.S. 128, 136-143, 98 S.Ct. 1717, 1723-27, 56 L.Ed.2d 168 (1978); *see also United States v. Hyde*, 574 F.2d 856, 869 (5th Cir.1978) (explaining that the minimization standard applies a test of reasonableness to the particular facts of each case) (citing *Daly*, 535 F.2d at 441). Neither the Fourth Amendment nor 18 U.S.C. § 2515, however, requires government agents to avoid intercepting all non-relevant conversations when conducting a wiretap investigation. *See Scott*, 436 U.S. at 137-140, 98 S.Ct. at 1723-24.

We consider three factors in deciding the objective reasonableness of efforts to minimize: (1) the "nature and scope of the criminal enterprise under investigation;" (2) the "Government's reasonable inferences of the character of a conversation from the parties to it;" and (3) the "extent of judicial supervision." *Hyde*, 574 F.2d at 869. Here, consistent with our precedent, the district court found that the FBI's efforts to minimize were reasonable in light of the fact that (1) the criminal investigation involved "a potentially wide-ranging conspiracy in which the coconspirators had not been identified;" (2) Goodson reported to Bankston "specific details of Goodson's truck stop business that one would not normally provide to one who was not a participant in the endeavor;" and (3) the issuing court had determined, based on regularly submitted ten-day reports, including the results of interceptions, that the Government was acting in a proper manner.

Bankston reurges statistical analyses he presented to the district court to question the Government's minimization efforts. Bankston's reliance on statistics is unpersuasive. First, the district court rightly pointed out that Bankston's statistics, even if taken as accurate, showed

minimization efforts that were reasonable. Second, the Supreme Court has discouraged the use of statistics, explaining that "blind reliance on the percentage of non-pertinent calls intercepted is not a sure guide to the correct answer." *Scott*, 436 U.S. at 140, 98 S.Ct. at 1724.

Goodson argues that the criminal nature of the December 1994 conversation could not have been immediately apparent because the subject of criminal activity was not broached until approximately twenty minutes into the conversation and that, by this point, agents should have already ceased monitoring the conversation. Goodson analogizes an agent's monitoring of communications concerning crimes not the subject of a wiretap order to an officer's seizure of contraband pursuant to the plain view doctrine. Goodson cites *United States v. Johnson*, 539 F.2d 181 (D.C.Cir.1976), in support of his novel plain view analogy. In particular, Goodson points to the following language from *Johnson*: "Like an officer who sees contraband in plain view from a vantage point where he has a right to be, one properly overhearing unexpected villainy need not ignore such evidence." *See id.* at 188. Goodson then attempts to graft onto the *Scott* objective reasonableness inquiry the plain view doctrine's probable cause requirement. He urges us to find that an agent monitoring "windfall" communications must, at the time of the monitoring, have probable cause to believe that the communication concerns criminal activity.

Caselaw does not support such a probable cause requirement. We are unaware of any case in which an appellate court employed a probable cause analysis to determine whether to suppress non-minimized, "other

criminal activity" communications. Moreover, requiring probable cause that a windfall communication itself concerns criminal activity is inconsistent with the objective reasonableness inquiry. Adding a probable cause analysis would require that monitoring agents be more than reasonable in their efforts to minimize. Goodson's approach would require that agents be gifted with "prescience" and the ability to " 'know in advance what direction the conversation will take.' " *United States v. Cox*, 462 F.2d 1293, 1301 (8th Cir.1972) (quoting *United States v. LaGorga*, 336 F.Supp. 190, 196 (W.D.Pa.1971)). Consistent with *Scott*, we conclude that the district court did not commit clear error in determining that the FBI's minimization efforts were objectively reasonable.

B. Choice of Counsel

Fred Goodson argues that the district court erred in denying, on grounds of conflict, his motion to associate Michael Fawer as additional counsel.[11] Goodson complains that the district court's ruling constitutes error in

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[11] Michael Fawer represented Goodson's co-defendant, former Louisiana State Senator Rayburn, through the investigative stage of this case. Fawer assisted Rayburn in responding to three grand jury subpoenas, had discussions with the Government regarding the nature of the charges being considered against Rayburn, and appeared in court on behalf of Rayburn at the initial appearance, as well as later to argue motions.

On November 5, 1996, Fawer withdrew as counsel for Rayburn, and Arthur A. Lemann, III replaced Fawer as counsel for Rayburn. On February 24, 1997, Goodson moved the district court to associate Fawer as additional counsel for him.

light of both his and Rayburn's knowing waiver of any conflict of interest and the sworn statements averring unawareness of any actual or potential conflict of interest submitted by Michele Fournet (counsel for Goodson), Michael Fawer, and Arthur Lemann.

We review a district court's finding of a conflict of interest for abuse of discretion. *See United States v. Sotelo*, 97 F.3d 782, 791 (5th Cir.1996). Although a district court must "recognize a presumption in favor of petitioner's counsel of choice," "that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict." *Wheat v. United States*, 486 U.S. 153, 164, 108 S.Ct. 1692, 1700, 100 L.Ed.2d 140 (1988). This is true even where a defendant expresses a desire to waive the potential conflict. *See Sotelo*, 97 F.3d at 791.

The crux of Goodson's argument is that the district court's veto of his choice of counsel without finding any "special circumstances" beyond the fact of multiple representation amounts to a per se rule that multiple representation would never be permissible. Goodson contends that such a per se rule contravenes Supreme Court and Fifth Circuit precedent that has recognized the advantages of common defenses. Goodson additionally argues that the four potential areas of conflict elucidated by the district court exist in every case of multiple representation and that appellate courts have regularly found that conflicts do not arise in those contexts.[12]

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[12] The district court outlined four areas of potential conflict: (1) because a plea by Goodson would be adverse to

Goodson's argument is flawed. First, the district court in no way established a per se rule against joint representation. The district court applied the Sixth Amendment and the Supreme Court's *Wheat* analysis to the facts developed at the hearing before the magistrate judge. On the basis of those facts, the district court concluded that institutional interests and interests of the defendant warranted a denial of Goodson's motion to associate Fawer. Second, neither the Supreme Court nor this Circuit has adopted a "special circumstances" test for determinations of conflict in joint representation. Although the Supreme Court's 1980 *Cuyler* decision does include "special circumstances" language, it does so only in discussing when a state court, sua sponte, needs to "initiate inquiries into the propriety of multiple representation." *Cuyler v. Sullivan*, 446 U.S. 335, 346, 100 S.Ct. 1708, 1717, 64 L.Ed.2d 333 (1980). Third, the cases upon which Goodson relies to show that joint representation is permissible despite possible conflicts of interest involve claims of ineffective assistance of counsel. In those cases, the courts employed a retrospective, record-based inquiry in order to determine whether an attorney was operating under a conflict of interest. Their findings of "no conflict" are of limited usefulness here, where the district court

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Rayburn's interests, Fawer would have a conflict in advising Goodson regarding plea negotiations; (2) evidence could develop at trial that pitted one defendant's interest against the other's; (3) Goodson's and Rayburn's interests could diverge at sentencing, over issues such as their respective roles in the offense; and (4) because Fawer received confidences from Rayburn, Fawer's cross-examination of Rayburn would be problematic.

predicated its denial of the motion to associate counsel on a finding of serious *potential* conflict. Goodson fails to appreciate the distinction between a retrospective inquiry of actual conflict and a prospective inquiry into serious potential conflict.

The evaluation of the facts and circumstances of each case under the *Wheat* standard "must be left primarily to the informed judgment of the trial court." *Wheat*, 486 U.S. at 164, 108 S.Ct. at 1700. The district court made specific findings as to four potential areas of serious conflict. We find that the district court did not abuse its discretion in denying Goodson's motion to associate Fawer.

C. Louisiana Video Poker License as "Property"

Maria Goodson and Attorney Cleveland assert that a Louisiana video poker license is not "property" for purposes of the mail fraud statute, 18 U.S.C. § 1341. Less than two years ago, we reached a contrary conclusion in *United States v. Salvatore*, 110 F.3d 1131 (5th Cir.1997). Bound by our prior decision, we do not revisit this issue.

D. Fair Notice

Maria Goodson and Cleveland argue that, at the time of their mail fraud offenses, they did not have fair notice that the acts charged were crimes. They claim that they did not have notice (1) that unissued video poker licenses constituted property under the mail fraud statute, and (2) that certain information needed to be reported to the Louisiana State Police on the video poker license applications. We find these arguments devoid of merit.

"The test of whether a statute is unconstitutionally vague so as to deprive fair notice is whether it provides a person of ordinary intelligence a reasonable opportunity to know what is proscribed." *United States v. Brewer,* 835 F.2d 550, 553 (5th Cir.1987). With regard to the first claim, we note that, at the time of the charged conduct, a circuit split existed as to whether or not unissued licenses constituted property for purposes of the mail fraud statute. Although we had not yet ruled on the issue, at least two circuits had found that unissued licenses are property for mail fraud purposes. Accordingly, we conclude that, assuming each to be of ordinary intelligence, Maria Goodson and Cleveland had reasonable opportunity to know that their conduct could be proscribed by the mail fraud statute. *Cf. United States v. Brumley,* 116 F.3d 728, 732 (5th Cir.1997) (en banc), ("Constructions of a statute announced by the Supreme Court or lower courts can give citizens fair warning, even if the cases are not fundamentally similar." (quotation marks omitted)).

We are equally unpersuaded by Maria Goodson and Cleveland's claim that they did not have fair notice that the Louisiana State Police required disclosure of indefinite and contingent plans to acquire an equity interest in a video poker licensee at some unspecified time in the future, or an ownership or other interest in a licensee of less than five percent. The "Affidavit of Full Disclosure" that accompanied the initial and renewal applications explicitly required that video poker applicants be the "sole beneficial owner of any direct or indirect interest in or to a licensed gaming operation . . . except such as having been reported in writing to the Louisiana State Police." The affidavit required that applicants attest that

they had (1) "no agreements or understandings with any other person and no present intent to hold as agent, nominee, associate, third party or otherwise any direct or indirect interest whatsoever in or to the licensed gaming operation" and (2) "no agreements or understandings with any other person and no present intent to transfer at any future time any interest whatsoever. . . . " We find that this language provided a person of ordinary intelligence adequate notice that ownership interests in any amount must be disclosed to the Louisiana State Police. Similarly, we find the "agreement or understanding" language sufficiently broad to include indefinite and contingent plans to acquire equity interests at some unspecified future time. We therefore conclude that Maria Goodson and Cleveland had fair notice.

E. State Law "Ownership" Jury Instructions

Cleveland, Fred Goodson, and Maria Goodson claim that the district court erred in refusing to charge the jury concerning certain state-law concepts of ownership. The district court refused to give the requested instructions because, *inter alia*, the state-law concepts did "not go to the guilt or innocence of the defendants." We review a district court's refusal to provide a requested instruction for abuse of discretion. *See United States v. Pennington*, 20 F.3d 593, 599 (5th Cir.1994). Although we have recognized the importance of instructing on legal concepts significant to a theory of defense, *see, e.g., United States v. Cavin*, 39 F.3d 1299, 1310 (5th Cir.1994) (reversing a conviction because the court failed to instruct on state ethical rules relevant to an attorney's theory of defense), we have

never required that a district court instruct a jury on peripheral concepts that do not directly implicate an essential element of the charged offense.

Cleveland argues that the ownership instructions were directly relevant to both his guilt or innocence and that of Fred and Maria Goodson. According to Cleveland, the critical issue to be decided by the jury was whether TSG, Ltd.'s license applications contained "fraudulent representations or omissions," that is, whether in keeping with the Government's theory of the case, the mailed video poker license applications failed to disclose hidden interests of Fred Goodson and Carl Cleveland in TSG, Ltd., as owners, option holders, or pledge recipients.[13] Cleveland contends that the jury could not fairly decide who owned TSG, Ltd. without knowing whether Goodson or Cleveland had enforceable ownership interests under state law.

We disagree. The jury was instructed to find whether the video poker license applications were fraudulent in so far as affidavits submitted by Maria and Alex Goodson failed to mention any (1) agreements or understandings with any other persons to hold their interests as a nominee, agent or otherwise, and/or (2) agreements or understandings with any other person and a present intent to

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[13] The district court instructed the jury that an essential element of mail fraud – distinct from specific intent – is that a defendant knowingly created a scheme to defraud. Such a scheme, according to the district court's instructions, must involve false or fraudulent representations or omission reasonably calculated to deceive persons of ordinary prudence and comprehension.

transfer at any future time any interest whatsoever in TSG, Ltd. Whether the "agreements or understandings" were enforceable under state law is not relevant to the question of whether Maria and Alex Goodson failed to disclose such arrangements to the Louisiana State Police. Accordingly, we find that the district court did not abuse its discretion in refusing to charge the jury as requested by Appellants. *See Pennington*, 20 F.3d at 600 (explaining that reversal is warranted only if the requested instruction (1) was a substantially correct statement of the law, (2) was not substantially covered in the charge as a whole, and (3) concerned an important issue in the trial).

Fred Goodson, Maria Goodson, and Cleveland also challenge the district court's supplemental instruction to the jury. In particular, they contend that the district court erred in giving a supplemental instruction that ignored state-law ownership principles and embraced the Government's theory that ownership could be determined simply from informal discussions.

After deliberations began, the jury sought clarification of three issues: (1) the legal definition of a partnership *in commendam*, (2) how much control is given up by partners, and (3) who appoints a general manager. In response, the district court provided the jury a general description of a partnership *in commendam* and the authority of the general and limited partners. The court concluded its supplemental instruction by charging the jury, over defense objections: "It is for you to determine based on all the evidence in the case what the parties' arrangements were as to control, ownership and management of Truck Stop Gaming, Ltd."

We find no reversible error.

> A trial judge enjoys wide latitude in deciding how to respond to a question from the jury. "When evaluating the adequacy of supplemental jury instructions, we ask whether the court's answer was reasonably responsive to the jury's question and whether the original and supplemental instructions as a whole allowed the jury to understand the issue presented to it."

United States v. Mann, 161 F.3d 840, 864 (5th Cir.1998) (footnotes omitted) (quoting *United States v. Stevens*, 38 F.3d 167, 170 (5th Cir.1994)). In this case, the court's supplemental instruction was reasonably responsive to the jury's questions. Moreover, as mentioned above, satisfaction of state law requirements for ownership transfers was not a critical issue to be decided by the jury.

F. Travel Act Jury Instructions

Bankston was convicted on two Travel Act counts, which incorporated Louisiana's public bribery statute. He argues that his conviction ought to be reversed because the district court abused its discretion in failing to submit to the jury proposed charges on gift, attempted bribery, and circumstantial evidence.

First, Bankston asserts that he was entitled to an instruction that it is legal for a legislator to receive a gift. Such an instruction, however, was unnecessary given the district court's charge that the Government had to prove beyond a reasonable doubt that Bankston, as the receiver of the bribe, acted "with the specific intent to be influenced in his conduct . . . as a Louisiana senator." Whether

Bankston could lawfully receive a gift was wholly irrelevant to the jury's inquiry. Because the district court's Travel Act instruction was clear, detailed, and substantially covered the charge suggested by Bankston, the court's refusal to instruct on gift does not amount to error.

Second, Bankston, complains that the district court refused to instruct the jury on the lesser included offense of attempted bribery under Louisiana law. He argues that, in Louisiana, such an instruction is not discretionary and that, had the jury found only attempted bribery, the elements of the Travel Act charge would not have been met. In federal prosecutions for violations of the Travel Act, we have never required that district courts instruct on lesser included offenses. Accordingly, we find Bankston's argument to be devoid of merit.

Third, Bankston argues that the district court committed reversible error by failing to instruct on Louisiana's "circumstantial evidence rule." Because we have squarely rejected efforts to graft non-substantive points of state law into RICO charges, Bankston's claim fails. *See, e.g., United States v. Brown*, 555 F.2d 407, 418 n. 22 (5th Cir.1977) (explaining that " 'the reference to state law in the federal statute is for the purpose of defining the conduct prohibited' and is not meant to incorporate the state statute of limitations or procedural rules" (quoting *United States v. Revel*, 493 F.2d 1, 3 (5th Cir.1974))).

G. Witness Testimony

Cleveland, Fred Goodson, and Maria Goodson claim that the Government elicited improper witness testimony

from two law enforcement officials, FBI Special Agent Gross and State Police Lieutenant Blackwelder. They launch four attacks on Gross and Blackwelder's testimony: (1) that both witnesses testified to legal conclusions, (2) that both witnesses gave testimony in the form of opinion, (3) that both witnesses testified as to "ultimate issue[s] of fact," and (4) that Gross's testimony exceeded his limited "summary" capacity. Evidentiary rulings are reviewed for abuse of discretion. *See General Electric Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 517, 139 L.Ed.2d 508 (1997).

We find that the district court did not abuse its discretion in permitting the challenged testimony. Because neither Gross nor Blackwelder was designated as an expert witness, most of the caselaw that Cleveland cites for the proposition that a witness cannot testify in the form of an opinion is inapplicable. Unlike expert witnesses, lay persons are allowed more leeway under the Federal Rules in testifying in the form of opinions. *See* Fed.R.Evid. 701. Lay persons are explicitly allowed to testify in the form of opinion or inference on "ultimate issue[s] to be decided by the trier of fact." Fed.R.Evid. 704. Additionally, witnesses can testify in more than one capacity. *See United States v. Castillo*, 77 F.3d 1480, 1499 (5th Cir.1996) (noting that a summary witness could testify in multiple capacities). Accordingly, Special Agent Gross could have testified as a lay fact witness as well as a summary witness. Having reviewed both Agent Gross's and Lieutenant Blackwelder's testimony, we find no reversible error.

H. Magazine Article Admission

Fred Goodson, Carl Cleveland, and Bankston challenge the district court's admission of a magazine article titled "Lies, Bribes and Videotape," found in the FBI's search of Fred Goodson's office. The district court admitted the article during redirect examination of FBI Special Agent Gross and instructed the jury that the article was being admitted not for the truth of the matter asserted, but solely on the issue of the state of mind of Fred Goodson, i.e., to contradict his assertions that he lacked knowledge and sophistication about politics and the types of transactions at issue. Evidentiary rulings are accorded considerable deference on appeal; "error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." Fed.R.Evid. 103(a); *see United States v. Brito*, 136 F.3d 397, 412 (5th Cir.1998).

Fred Goodson and Cleveland contest the admissibility of the article both as to relevance and as to prejudicial effect. Even were the article both irrelevant and prejudicial, however, its admission did not affect a substantial right of either Goodson, Cleveland, or Bankston. First, the district court did not allow introduction of the article by the Government until redirect examination. Second, the district court permitted only "narrow clarifying" references to the article in light of the defense's introduction, on cross examination, of other documents etc. that had been found in the same folder as the "Lies, Bribes and Video Tape" article. Third, the Government's redirect regarding the disputed article constituted less than four pages of transcript. Fourth, on recross, the defense had the opportunity to question Agent Gross in

detail about the subject matter of the article and elicited from him representations that the investigation described in the article in no way involved "anybody in this room."

For these reasons, we find that the admission of the "Lies, Bribes and Video Tape" article did not affect a substantial right of any appellant.

I. Prosecutor's Closing Remarks

All appellants claim that in his rebuttal argument the prosecutor made improper and inflammatory remarks, inviting the jury to convict the defendants in order to "make a change" and to "start taking back [their] state." Appellants argue that the district court's subsequent instruction failed to cure the taint of the improper closing and that reversal is therefore required.[14]

A criminal defendant bears a substantial burden when attempting to demonstrate that improper prosecutorial comments constitute reversible error. " 'A criminal conviction is not to be lightly overturned on the basis

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[14] The district court, both at trial and in its opinion on defendants' motions for new trial, recognized the impropriety of the prosecutor's "make a change" closing. At the conclusion of the prosecutor's argument, the court instructed the jury to disregard the prosecutor's improper remarks:

> I would like to instruct you again that this case is not about the general conditions in the state of Louisiana. To the extent that Mr. Manger made reference to that in his closing argument, you are instructed to disregard the comments about the general condition of Louisiana state government as it relates to education or other issues.

of a prosecutor's comments standing alone.' " *United States v. Lowenberg*, 853 F.2d 295, 302 (5th Cir.1988) (quoting *United States v. Young*, 470 U.S. 1, 11, 105 S.Ct. 1038, 1044, 84 L.Ed.2d 1 (1985)). Improper prosecutorial comments require reversal only if the comments substantially affected the defendant's right to a fair trial. *See United States v. Murrah*, 888 F.2d 24, 27 (5th Cir.1989). In evaluating the extent to which prosecutorial comments affected a defendant's right to a fair trial, three factors are considered: the magnitude of the prejudicial effect of the remarks, the efficacy of any cautionary instruction, and the strength of the evidence of the defendant's guilt. *See United States v. Casel*, 995 F.2d 1299, 1308 (5th Cir.1993).

Here, the inflammatory remarks, to which defense counsel objected at trial, came at the end of the prosecutor's rebuttal argument. The improper prosecutorial comments responded to improper arguments made by counsel for Rayburn. Any prejudicial effect inhering to the Goodsons, Bankston, and/or Cleveland, it seems, would have been substantially less than that attaching to Rayburn. Rayburn's acquittal therefore suggests that the jury was not influenced by the improper comments.[15]

With regard to the efficacy of the district court's instruction, the court more than once instructed the jury to disregard the improper arguments. The language the

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[15] Appellants argue that Rayburn's "sympathy" acquittal is of little significance because he was 80 years old at the time of the trial. Rayburn, however, was not the only defendant acquitted of charges. The fact that each appellant was found not guilty on some counts suggests that the jury reached its verdict free of the taint of the prosecutor's improper remarks.

court adopted when instructing the jury for the second time was in part borrowed from the words of Bankston's attorney. We find sufficiently curative both the district court's repeated instruction to disregard the improper argument as well as its caution to the jury that lawyer argument was not evidence.

Finally, as to the strength of the evidence of guilt, our review of the trial record in its entirety reveals that the evidence presented by the Government was sufficient to support each of the convictions against each of the appellants. Thus, we conclude that the prosecutorial comments did not substantially affect the Goodsons', Cleveland's, or Bankston's respective rights to a fair trial.

J. Sufficiency of the Evidence

Fred Goodson, Maria Goodson, and Larry Bankston contest the sufficiency of the evidence to support their respective convictions. In evaluating the sufficiency of the evidence on appeal, we consider the evidence in the light most favorable to the Government, drawing all reasonable inferences in support of the jury's verdict. *See United States v. Lopez*, 74 F.3d 575, 577 (5th Cir.1996). The evidence is sufficient if a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *United States v. Gaytan*, 74 F.3d 545, 555 (5th Cir.1996). The evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, and the jury is free to choose among reasonable constructions of the evidence. *See Lopez*, 74 F.3d at 577.

We address the arguments raised by each appellant in turn.

1. Fred Goodson

Fred Goodson argues that the evidence is insufficient to support his two-count conviction for mail fraud because it fails to establish that he had the specific intent to commit fraud.

To establish a mail fraud violation under 18 U.S.C. § 1341, the Government must demonstrate (1) a scheme to defraud, (2) the use of mails to execute that scheme, and (3) the defendant's specific intent to commit fraud. *See United States v. Tencer*, 107 F.3d 1120, 1125 (5th Cir.1997). "Intent to defraud requires an intent to (1) deceive, and (2) cause some harm to result from the deceit." *United States v. Jimenez*, 77 F.3d 95, 97 (5th Cir.1996). A defendant has the intent to defraud if he acts knowingly with the specific intent to deceive for the purpose of causing pecuniary "loss to another or bringing about some financial gain to himself." *United States v. Blocker*, 104 F.3d 720, 732 (5th Cir.1997).

According to Goodson, the mail fraud charges rested on two premises: that he and Cleveland were the "true owners" of Truck Stop Gaming, and that they hid that fact from regulators in order to avoid a suitability investigation of their finances. Goodson, on appeal, contests the sufficiency of the evidence only as it relates to the second premise – Goodson and Cleveland's avoidance of a suitability investigation.

This second premise, however, does not constitute an essential element of mail fraud. Instead, the desire to avoid a suitability investigation relates merely to motive, representing the Government's theory as to why Cleveland and Goodson committed the fraud. Because we have never required the Government to prove nor the jury to find motive beyond a reasonable doubt, Fred Goodson's argument fails.

2. Maria Goodson

Maria Goodson challenges the sufficiency of the evidence for her mail fraud conviction. She claims that the Government failed to establish that she knowingly, and with specific intent to defraud, participated in a scheme to hide either (1) the true ownership interests of her father and Carl Cleveland in TSG, Ltd. or (2) the 4.99% ownership interest held by Benny Rayburn, Jr.

Because the jury need only have found Maria Goodson guilty beyond a reasonable doubt on one of the two potential schemes underlying her mail fraud conviction, we address only the evidence concerning Maria Goodson's specific intent to conceal the 4.99% ownership interest transferred to Benny Rayburn. The Government presented the jury with a document dated August 1, 1994, signed by Maria Goodson in which she agreed to "assign, sell, convey and deliver unto Benjamin B. Rayburn, Jr. a 4.99% interest out of a 100% interest in the Truck Stop Gaming, Ltd. partnership." Evidence showed that the transfer of this interest was not reported to the State Police in TSG, Ltd.'s 1995 license renewal application,

even though such minority purchases were required to be reported.

Maria Goodson's awareness of the transfer of ownership is indicated by two pieces of evidence. First, she signed the conveyance itself. Second, in a recorded conversation between Maria Goodson and family accountant Joe Morgan, she described BAJ, LLC, the limited liability company to which Rayburn ultimately transferred his 4.99% interest, as having become a 4.9% partner. Accordingly, we find that the jury had sufficient evidence to convict Maria Goodson for mail fraud.

3. Larry Bankston

Larry Bankston contests the sufficiency of the evidence as to his conviction on two counts of violating the Travel Act, 18 U.S.C. § 1952 (1997). The first count involved an interstate telephone call on June 20, 1995, from Fred Goodson to Meyer Realty to set up what was alleged to have been a bribe in the form of a "sham" rental of Bankston and his wife's Gulf Shores condominium. The second involved Fred Goodson's use of an interstate commercial carrier on June 22, 1995, to forward a $1,555.01 check to Meyer Realty as payment for the condominium rental.

The essential elements for a Travel Act conviction are:

> (1) travel or use of the mail or any facility in interstate or foreign commerce;
>
> (2) with the specific intent to promote, manage, establish, or carry on – or distribute the proceeds of – unlawful activity; and

> (3) knowing and willful commission of an act in furtherance of that intent subsequent to the act of travel or use of the mail or facility of interstate or foreign commerce.

See United States v. Logan, 949 F.2d 1370, 1380-81 (5th Cir.1991). Under Louisiana law, an elected official is guilty of public bribery if he accepts anything of apparent present or prospective value with the specific intent to be influenced in his employment, position, or duty. *See* La.Rev.Stat. Ann. § 14:118 (West Supp.1999).

Bankston attacks the sufficiency of the evidence on three separate grounds: (1) insufficient proof that he had the requisite intent to be influenced in his official conduct by the condominium rental; (2) insufficient proof that the condominium rental amounted to anything more than a legal gift; and (3) insufficient proof that he committed an overt act in furtherance of the alleged bribery after the interstate communications at issue.

The evidence at trial does not support Bankston's claim. The evidence showed that in February 1995 Bankston and his wife discussed establishing an arrangement whereby a proposed "renter" would pay to use their Alabama condominium despite the renter's true intention not to do so. Records from Meyer Realty showed that Fred Goodson rented the Bankstons' condominium and paid for the rental by check. Testimony from FBI agents revealed that the Bankston family, not Goodson, used the condominium during the rental week in question. Finally, the jury heard many intercepted conversations between Bankston and others in which Bankston indicated that he would use the power of his office to protect Goodson's video poker interests during the legislative session. Based

upon this evidence, we affirm Bankston's conviction on the two Travel Act counts.

K. Sentencing

1. Maria Goodson

a. Section 5K2.7 Upward Departure

Maria Goodson complains that the district court improperly enhanced her offense level six points for a "significant disruption of governmental function," pursuant to U.S. Sentencing Guideline section 5K2.7.[16] She argues that the disruption identified by the district court is not the type of "significant" disruption that the Commission contemplated when drafting section 5K2.7 and that, although the submission to a state agency of one false application may disrupt the agency's function, it only does so in an "ordinary" sense. We disagree.

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[16] Section 5K2.7 provides in part:

> If the defendant's conduct resulted in a significant disruption of a governmental function, the court may increase the sentence above the authorized guideline range to reflect the nature and extent of the disruption and the importance of the governmental function affected. Departure from the guidelines ordinarily would not be justified when the offense of conviction is an offense such as bribery or obstruction of justice; in such cases interference with a governmental function is inherent in the offense, and unless the circumstances are unusual the guidelines will reflect the appropriate punishment for such interference.

A district court has "wide discretion" in imposing a section 5K2.7 upward departure. *United States v. Hatch*, 926 F.2d 387, 397 (5th Cir.1991) (explaining that the Fifth Circuit has repeatedly granted district courts "wide discretion to decide whether aggravating factors exist to support an upward departure"). The appropriateness of a departure turns on the importance of the government function impacted, not the degree of the impact. *Cf. Hatch*, 926 F.2d 387 (affirming a 5K2.7 upward departure based on the defendant, a former Louisiana sheriff, authorizing payments, representing a portion of the sheriff office's operating budget, to a purported jail construction project consultant); *United States v. Garcia*, 900 F.2d 45 (5th Cir.1990) (holding that an upward departure was warranted and reasonable where postal inspectors recovered 248 first-class letters from the possession of a defendant postal employee). Here, when Maria Goodson submitted TSG, Ltd.'s false 1995 renewal application, failing to disclose any ownership interest held by Fred Goodson, Carl Cleveland, or Benny Rayburn, she effectively shielded those men from suitability analysis. In doing so, Maria Goodson thwarted Louisiana's video poker regulatory and licensing scheme designed to investigate the honesty and integrity of prospective license holders. Based upon the importance of that regulatory scheme, we find that the district court did not abuse its discretion in imposing a section 5K2.7 upward departure.

b. Loss Calculation

The Government, in its cross-appeal, contends that the district court miscalculated Maria Goodson's offense level. Maria Goodson was convicted of one count of mail

fraud in connection with TSG, Ltd.'s 1995 license renewal application. The district court sentenced her in accordance with section 2F1.1 of the Sentencing Guidelines. That section specifies a base offense level of six for fraud and provides for incremental increases in the offense level depending on, *inter alia*, the amount of loss caused by the fraud. *See* U.S. Sentencing Guidelines Manual § 2F1.1 (1997). In calculating Maria Goodson's offense level, the court found that the State of Louisiana had suffered no "actual or intended monetizable loss . . . by virtue of Ms. Goodson's having fraudulently obtained the license." Accordingly, the district court did not increase Ms. Goodson's base offense level for any loss.

The Government asserts that the district court erred in finding that the State of Louisiana suffered no loss and in failing to use defendant's gain as an alternative method of valuation. The Government asserts that, in keeping with section 2F1.1's Application Note 8, Maria Goodson's base offense level should have been increased eleven levels based upon TSG, Ltd.'s $1.4 million annual gain. *See* U.S. Sentencing Guidelines Manual § 2F1.1 App. Note 8 (1997); *see also United States v. Smithson*, 49 F.3d 138, 144 (5th Cir.1995) (recognizing that under section 2F1.1, Application Note 8, a sentencing court may utilize the offender's gain as an alternative valuation method for assessing the amount of loss when the loss is difficult to determine).

In its sentencing cross-appeal, the Government urges use of TSG, Ltd.'s $1.4 million annual revenues as the appropriate valuation of Maria Goodson's gain, yet throughout trial and all subsequent forfeiture proceedings, the Government argued that Maria Goodson, in fact,

was not the "true owner" of TSG, Ltd. The verdict of the jury as well as the district court's judgment of forfeiture confirmed the success of the Government's hidden ownership theory of prosecution. Accordingly, we consider Fred Goodson and Carl Cleveland the true owners of TSG, Ltd. and agree that TSG, Ltd.'s $1.4 million gain could not be attributed to Maria Goodson, a non-owner. Therefore, the district court did not err in refusing to use TSG, Ltd.'s $1.4 million annual revenues as an alternative valuation method for loss pursuant to section 2F1.1.

2. Bankston

a. Eleven-level Enhancement

Bankston challenges as unsupported by the evidence the district court's eleven-level increase in his base offense level under section 2C1.1(b)(2)(A). This Court examines a district court's factual findings only for clear error and affords great deference to the court's application of the Guidelines to those facts. *See United States v. Snell*, 152 F.3d 345, 346 (5th Cir.1998).

The district court, relying on the Presentence Report ("PSR") as well as facts elicited at trial and the forfeiture proceeding, based Bankston's offense level enhancement on its calculation of the "expected benefit to be received by the individual paying the bribe," namely Fred Goodson.[17] The district court found that the benefit to be

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[17] The Guidelines assign punishment at the greatest of three calculations: (1) the value of the bribe; (2) the value of the benefit to be received; or (3) if the offense involved payment for the purpose of influencing an elected official, an eight-level increase. *See* U.S. Sentencing Guidelines Manual § 2C1.1 (1997).

received by Goodson in return for the bribe was protection for a two-year period from legislation that would otherwise interfere with the continued operation of his video poker business. The district court, recognizing that evidence at trial supported a finding that Goodson held a 50% interest in TSG, Ltd., determined that the expected benefit to be received by Goodson was one-half the profits to TSG, Ltd. for a two-year period, or $1.4 million. We find the district court's "Reasons for Sentencing of Larry S. Bankston" to be thorough and well-reasoned. Bankston's assertion of error is meritless.

b. Expected Benefit

The Government, on cross-appeal, argues that the district court erroneously reduced the expected benefit to be received for the bribe to the ownership percentage in TSG, Ltd. of the briber, Fred Goodson. Specifically, the Government contends that the district court erred in limiting "benefit" as used in section 2C1.1(b)(2)(A) to "personal benefit," failing to consider the actual benefit sought, the continued unfettered operation of the RICO enterprise. The issue raised by the Government is one of first impression for this Circuit.

It is well established that sentencing courts are bound by "commentary in the Guidelines Manual that interprets or explains a guideline . . . unless it violates the Constitution or a federal statute, or is inconsistent with, or [is] a plainly erroneous reading of, that guideline." *See Stinson v. United States*, 508 U.S. 36, 38, 113 S.Ct. 1913, 1915, 123 L.Ed.2d 598 (1993). The Commentary to section 2C1.1 states that for deterrent purposes, the punishment

should be commensurate with the "gain to the payer or the recipient of the bribe," whichever is higher. As contemplated by the Commission, the "gain to the payer" is the "value of the benefit received or to be received." Thus, the expected benefit to be received as referenced in section 2C1.1 is the benefit to the payer of the bribe.

Resolution of the Government's cross-appeal, therefore, turns on the identity of the "payer." If Fred Goodson, in his individual capacity, bribed Bankston, then the district court properly limited "expected benefit" to an amount equivalent to Goodson's personal benefit. If, on the other hand, Fred Goodson, as agent for TSG, Ltd., bribed Bankston, then the Government would be correct that the expected benefit ought to be measured by the profits to the RICO enterprise.

The issue of the identity of the payer is a question of fact best resolved by the district court. Because the evidence presented at trial could support either the individual-capacity or RICO-enterprise theory of bribery, we cannot conclude that the district court committed clear error in determining that the personal benefit to Goodson was the appropriate valuation of the expected benefit to be received.

L. RICO Forfeiture

A person who violates RICO must forfeit any interest acquired or maintained in violation of the statute, any enterprise established or conducted in violation of RICO, and any property constituting or derived from proceeds obtained in violation of RICO. *See* 18 U.S.C. § 1963(a). Here, the Government sought, and the district court

ordered, the forfeiture of both Fred Goodson's and Carl Cleveland's interests in TSG, Ltd., in an amount equal to the proceeds received by TSG, Ltd. between July 1994 and August 1995. Fred Goodson, Carl Cleveland,[18] Maria Goodson, Alex Goodson, and TSG, Inc. appeal, albeit on different grounds, the district court's judgment of forfeiture.

With regard to Fred Goodson's and Carl Cleveland's claim, we note that the district court ordered that the proceeds of TSG, Ltd. be forfeited pursuant to 18 U.S.C. § 1963(a)(1) and (a)(2), as well as (a)(3). Goodson, though, attacks only two of these three grounds. He raises no error as to the forfeiture of proceeds under § 1963(a)(3). Given the identity of proceeds forfeited pursuant to each theory, we affirm the district court's August 1997, forfeiture order.

Maria Goodson, Alex Goodson, and TSG, Inc. argue that the district court erred in failing properly to apply Louisiana law to the question of ownership of TSG, Ltd. and TSG, Inc. They assert that no state law exists that would support the district court's ruling that Fred Goodson and Carl Cleveland were the "true owners" of TSG, Ltd.

Section 1963(*l*)(6)(A) provides petitioners the opportunity to recoup forfeited property if they can establish by a preponderance of the evidence either (1) that they have a current legal right, title, or interest in the property *and* that the right, title, or interest was vested in them

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[18] Carl Cleveland incorporates Fred Goodson's forfeiture arguments.

instead of the defendant at the time of the commission of the RICO offenses; or (2) that they have a current legal right, title, or interest in the property *and* that the right, title, or interest was superior to the right, title, or interest of the defendant at the time of the commission of the RICO offenses. *See* 18 U.S.C. § 1963(*l*)(6)(A). We review the district court's findings of fact under the clearly erroneous standard and the question of whether those facts constitute legally proper forfeiture de novo. *See United States v. Marmolejo*, 89 F.3d 1185, 1197 (5th Cir.1996).

Maria and Alex Goodson assert that they are the record owners of TSG, Ltd. and its corporate general partner, TSG, Inc. They point to TSG, Ltd.'s Agreement of Partnership, which they both signed and which was filed with the Louisiana Secretary of State, as evidence of their current and superior interest in the forfeited companies. They urge us to find that the district court improperly disregarded their partnership agreement when it concluded that Fred Goodson and Carl Cleveland were the true owners of TSG, Ltd.

We agree with the district court's decision not to allow an obviously false partnership agreement to be used to provide the basis for a claim of interest under § 1963(*l*)(6)(A). As the district court indicated, the jury's verdict in the instant case established that Fred Goodson, Maria Goodson, and Carl Cleveland perpetrated a fraud on the State of Louisiana. The jury necessarily found that Fred Goodson and Carl Cleveland were the true owners of TSG, Ltd. and that Maria Goodson and her brother Alex were straw people used in the sham to hide the true ownership of TSG, Ltd.

Testimony at the October 31, 1997 evidentiary hearing to determine the interests of Alex and Maria Goodson bolsters our resolve not to allow them to assert ownership in the TSG entities based upon their "sham" partnership agreement. With regard to Alex Goodson, the district court found that his hearing testimony revealed that he did not consider himself to have any real interest in either TSG, Inc. or TSG, Ltd. Alex described his involvement with the companies as someone executing an ownership document as an agent of the company, in the capacity of a nominee. His testimony revealed that he had no understanding of the "contribution" that was attributed to him in the partnership agreement for TSG, Ltd. As to Maria Goodson, the court found that her testimony likewise "fell short of establishing that she and her brother . . . were the true owners of the Truck Stop Gaming entities." In particular, Maria Goodson told the court at the forfeiture hearing that at the time the companies were formed and incorporated, she did not associate a company being "in her name" with ownership. Equally problematic was a conversation with Carl Cleveland in which she requested 1% of the net profits of TSG, Ltd. If she had in fact been the owner of the TSG entities, she would not have needed to ask Carl Cleveland for an interest in a percentage of the companies' profits.

In light of the above evidence, the district court properly disregarded the "sham" partnership agreement. Consistent with the detailed analysis provided in the district court's April 1998 order, we conclude that Alex Goodson, Maria Goodson, and TSG, Inc. failed to demonstrate by a preponderance of the evidence a legal right, title, or

interest in TSG, Ltd. Their appeal of the district court's April 1998 judgment of forfeiture, therefore, fails.

III. Conclusion

Appellants raise an abundance of evidentiary, statutory, and constitutional challenges, none of which warrant reversal. For the reasons stated above, we affirm each Appellant's judgment of conviction and sentence as well as the judgment of forfeiture.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-31057

UNITED STATES OF AMERICA

Plaintiff –
Appellee-Cross-Appellant

v.

LARRY S BANKSTON; MARIA F GOODSON

Defendants –
Appellants-Cross-Appellees

CARL W CLEVELAND; FRED H GOODSON

Defendants – Appellants

Cons/w No. 98-30471

UNITED STATES OF AMERICA

Plaintiffs – Appellee

v.

MARIA F GOODSON

Defendant – Appellant

ALEXANDROS F GOODSON; TRUCK STOP GAMING LTD

Intervenors – Appellants

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

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ON PETITIONS FOR REHEARING AND REHEARING EN BANC

(Opinion 7/21/99, 5 Cir., ___, ___ F.3d ___)

(Filed Sept. 2, 1999)

Before KING, Chief Judge, and REAVLEY and BENAVIDES, Ciruict [sic] Judges.

PER CURIAM

(✓) The Petitions for Rehearing on behalf of Larry Bankston, Fred H Goodson and Carl W Cleveland are DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc on behalf of Fred H Goodson, Carl W Cleveland and Maria F Goodson is also DENIED.

( ) The Petitions for Rehearing on behalf of Larry Bankston, Fred H Goodson and Carl W Cleveland are DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor. (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc on behalf of Fred H Goodson, Carl W Cleveland and Maria F Goodson is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsiderations of this cause en

banc, and a majority of the judges in active service not having voted in favor, the Petition for Rehearing En Banc on behalf of Fred H Goodson, Carl W Cleveland and Maria F Goodson is DENIED.

ENTERED FOR THE COURT:

/s/ Fortunato P. Benavides
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 97-31057

UNITED STATES OF AMERICA

Plaintiff –
Appellee-Cross-Appellant

v.

LARRY S BANKSTON; MARIA F GOODSON

Defendants –
Appellants-Cross-Appellees

CARL W CLEVELAND; FRED H GOODSON

Defendants – Appellants

No. 98-30471

UNITED STATES OF AMERICA

Plaintiffs – Appellee

v.

MARIA F GOODSON

Defendant – Appellant

ALEXANDROS F GOODSON; TRUCK STOP GAMING LTD

Intervenors – Appellants

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

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ON PETITION FOR REHEARING

(Filed Sep. 22, 1999)

Before KING, Chief Judge, and REAVLEY and BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed on behalf of appellant-cross-appellee Maria F Goodson, and appellants, Alexandros Goodson and Truck Stop Gaming in the above Case is DENIED.

ENTERED FOR THE COURT:

/s/ Fortunato P. Benavides
United States Circuit Judge

APPENDIX D

UNITED STATES OF AMERICA

v.

CARL W. CLEVELAND, FRED H. GOODSON, MARIA F. GOODSON, JOE H. MORGAN, BENJAMIN BURA RAYBURN, SR. AKA "B.B. SIXTY RAYBURN" AND LARRY S. BANKSTON.

Criminal Action No. 96-207.

UNITED STATES DISTRICT COURT,
E.D. LOUISIANA.

Jan. 14, 1997.

Anthony J. Marabella, Jr., Marabella & Moore, Baton Rouge, LA, for Carl W. Cleveland.

Marilyn Michele Fournet, Baton Rouge, LA, for Fred H. Goodson.

Katherine Wheeler, Steffes & MacMurdo, Baton Rouge, LA, James Michael Small, Law Offices of J. Michael Small, Alexandria, LA, for Maria F. Goodson.

Arthur A. Lemann, III, Arthur A. Lemann & Associates, New Orleans, LA, William R. Campbell, Jr., New Orleans, LA, Michael Seth Fawer, Smith, Jones & Fawer, New Orleans, LA, for Benjamin Bura Rayburn, Sr.

Christopher Mar Guidroz, Simon, Peragine, Smith & Redfearn, LLP, New Orleans, LA, George Shaddock, Pascagoula, MS, for Joe H. Morgan.

Karl J. Koch, Lewis O. Unglesby, Unglesby & Koch, Baton Rouge, LA, for Larry S. Bankston.

Ian Hipwell, U.S. Attorney's Office, Baton Rouge, LA, Robert J. Boitmann, U.S. Attorney's Office, New Orleans, LA, for U.S.

ORDER AND REASONS

VANCE, District Judge.

I. Introduction

This criminal case involves allegedly illegal activity in the video poker industry in Louisiana. The defendants are former Louisiana State Senators Benjamin ("B.B. Sixty") Rayburn and Larry S. Bankston; an attorney, Carl Cleveland; an accountant, Joe H. Morgan; and two alleged video poker entrepreneurs, Fred H. Goodson and his daughter, Maria F. Goodson.

The government charges each of the defendants with racketeering and racketeering conspiracy and charges various defendants with mail fraud, conducting an illegal gambling business, interstate communications in aid of racketeering, conspiracy to defraud the United States, filing of a false income tax return, false declaration under penalty of perjury, aiding and abetting false declaration under penalty of perjury, and money laundering. Defendant Fred Goodson ("Goodson") challenges certain counts of the indictment as predicated on constitutionally infirm criminal statutes and claims that other charges should be dismissed because a video poker license does not constitute the "money or property" needed to support a federal mail fraud conviction. For the reasons stated below, both of Goodson's motions are DENIED.

II. Defendant Fred Goodson's Motion to Dismiss All Illegal Gambling Counts, All Money Laundering Counts, and All Racketeering Acts Predicated on Either Illegal Gambling or Money Laundering Counts

A. Background: Commerce Clause Jurisprudence and *Lopez*

Defendant Fred Goodson moves to dismiss racketeering acts 1e, 2a, 2b, 2c, 2d, 2e, Count 7, and Counts 8 through 12 of the superseding indictment on the grounds that the criminal statutes on which these allegations are based, 18 U.S.C. § 1955 (conducting an illegal gambling enterprise), and 18 U.S.C. § 1956 (money laundering), are facially unconstitutional or, alternatively, that the application of these statutes to this case is unconstitutional in that it constitutes a violation of the Commerce Clause and the Tenth Amendment of the United States Constitution.

It is a fundamental principle of constitutional law that the federal courts are courts of limited jurisdiction and that federal criminal jurisdiction is limited to cases arising under the United States Constitution or federal law. *See* U.S. Const. Art. III, § 2. The Constitution specifically enumerates only five criminal activities.[1] All other federal crimes are the product of Congressional statutes. Congress, however, is not free to pass any criminal statute it deems appropriate. Rather, to pass constitutional

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[1] These enumerated crimes are counterfeiting, U.S. Const. Art. I § 8, cl. 6; piracy on the high seas, U.S. Const. Art. I § 8, cl. 10; treason, U.S. Const. Art III § 3, cl. 2; offenses against the law of nations, U.S. Const. Art. I, § 8, cl. 10; and offenses supporting impeachment, U.S. Const. Art. I § 3, cls. 6 and 7.

muster, all federal criminal statutes must be passed pursuant to one of the specifically enumerated powers in the Constitution. Defendant attacks the constitutional validity of 18 U.S.C. § 1955 (conducting an illegal gambling enterprise) and 18 U.S.C. § 1956 (money laundering) by arguing that neither statute was passed pursuant to a specifically enumerated Congressional power. Defendant maintains that both statutes regulate activity that falls outside the scope of Congress' power to regulate interstate commerce under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3.[2] The Fifth Circuit has already upheld both statutes in question under the Commerce Clause. *See United States v. Gallo*, 927 F.2d 815, 822 (5th Cir.1991) (recognizing the validity of 18 U.S.C. § 1956); *United States v. Harris*, 460 F.2d 1041, 1044 (5th Cir.1972) (upholding 18 U.S.C. § 1955). Defendant nevertheless argues that this Court should reconsider those decisions in light of the United States Supreme Court's recent decision in *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995).

In *Lopez*, the Supreme Court struck down the Gun Free School Zone Act ("the GFSZA"), a federal statute making it a crime to knowingly possess a firearm in a school zone, on the grounds that it exceeded the authority of Congress under the Commerce Clause. *Lopez* marked the first time since 1936 that the Supreme Court invalidated a federal statute under the Commerce Clause

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[2] The Commerce Clause states that "[t]he Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . . " U.S. Const. art. I, § 8, cl. 3.

and clearly indicated a shift towards a more restrictive view of Congress' powers under the Commerce Clause than had been espoused in the past.[3]

The *Lopez* Court enumerated three categories of activity that Congress may regulate under its commerce power:

> First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.

Lopez, 514 U.S. at ___-___, 115 S.Ct. at 1629-30 (internal citations omitted).

The Court found that the GFSZA did not meet either of the first two categories and thus could be upheld only if the statute regulated an activity that "substantially affected interstate commerce." *Id.* In this case, all parties agree that the activities regulated under the statutes in

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[3] For the storied history of the Court's interpretation of the Commerce Clause, *see Lopez*, 514 U.S. ___ ___, 115 S.Ct. 1624, 1626-29; Laurence Tribe, *American Constitutional Law* § 5-4 to 5-7, at 305-13 (2d ed. 1988) (describing initial view that Commerce Clause powers were broad, giving way to a "formalistic" reading of the Commerce Clause, in turn giving way to a "virtually unbounded" reading of the Commerce Clause prior to *Lopez*).

question – illegal gambling and money laundering – clearly do not fall under the first two *Lopez* categories. As in *Lopez*, the Court's Commerce Clause analysis is therefore confined to the third *Lopez* category and the application of the "substantial effects" test. Defendant argues that neither illegal gambling nor money laundering has the requisite "substantial effect" on interstate commerce to permit federal regulation under the Commerce Clause after *Lopez*.

B. Standard of Review

Under *Lopez*, this Court must determine whether a rational basis exists for concluding that the activity to be regulated substantially affected interstate commerce. Chief Justice Rehnquist, in the majority opinion, stated:

> In [*National Labor Relations Board v.] Jones & Laughlin Steel*, [301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893] [(1937)], the Court warned that the scope of the interstate commerce power 'must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.' (citations omitted). Since that time, the Court has heeded that warning and undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce.

Lopez, 514 U.S. at ___, 115 S.Ct. at 1629 (citing *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452

U.S. 264, 276-80, 101 S.Ct. 2352, 2360-62, 69 L.Ed.2d 1 (1981)).

Further, although the rational basis test was not new to the Court's Commerce Clause analysis, the Supreme Court applied the test with more rigor in *Lopez* than it had in the past. The *Lopez* Court did not, however, establish precise guidelines for determining whether an activity can be rationally found to have a substantial effect on interstate commerce. Rather, finding that the GFSZA did not regulate activity that substantially affected interstate commerce, the *Lopez* Court found three deficiencies in the statute. First, the GFSZA by its terms "ha[d] nothing to do with commerce or any sort of economic enterprise, however broadly one might define those terms" *Lopez*, 514 U.S. at ___-___, 115 S.Ct. at 1630-31. Second, the GFSZA "contain[ed] no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affect[ed] interstate commerce." *Id.* at ___, 115 S.Ct. at 1631. Third, there were no express Congressional findings regarding the effects upon interstate commerce, and the arguments advanced in their absence would permit limitless assertions of federal power. *Id.* at ___, 115 S.Ct. at 1632.

While the Court found that the statute failed to satisfy all of these considerations, it did not assign the relative weights to be accorded each of these factors. It has been suggested that the Court left unclear, for example, whether a statute must satisfy all three of the *Lopez* considerations to be constitutional or whether it simply needs to satisfy one of them. *See United States v. Wall*, 92 F.3d 1444, 1460 (6th Cir.1996) (Boggs, J., concurring in

part and dissenting in part) ("Because the GFSZA satisfied none of the three subparts, the Court did not have to face the[ ] question [of the relationship between the subparts]. But [this question] cannot be ignored."). The Fifth Circuit's post-*Lopez* decisions do not directly address this issue either.

C. The Fifth Circuit's Post-*Lopez* Jurisprudence

Since *Lopez*, the Fifth Circuit has had two occasions to examine the validity of various federal criminal statutes in light of *Lopez*, and both times the Court has distinguished the statute at issue from the one struck down in *Lopez*. *See United States v. Rawls*, 85 F.3d 240, 242 (5th Cir.1996) (upholding 18 U.S.C. § 922(g), prohibiting possession by a felon of a firearm shipped in interstate commerce); *United States v. Coleman*, 78 F.3d 154, 158 (5th Cir.), *cert. denied*, ___ U.S. ___, 117 S.Ct. 230, 136 L.Ed.2d 161 (1996) (upholding 18 U.S.C. § 2119, prohibiting carjacking); *see also United States v. Kuban*, 94 F.3d 971, 973 (5th Cir.1996) (upholding Section 922(g) by summarily citing *Rawls*).[4]

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[4] The Court notes that the Fifth Circuit had a third occasion to rule on the constitutionality of a federal criminal statute under the Commerce Clause post-*Lopez*. *See United States v. Kirk*, 70 F.3d 791, 795-96 (5th Cir.1995) (upholding 18 U.S.C. § 922(o), prohibiting the transfer or possession of machine guns manufactured or illegally transferred after May 19, 1986). However, the decision in Kirk was recently vacated, and the case is presently pending before the en banc court. *See* 78 F.3d 160 (1996).

In *United States v. Coleman*, the Court clarified that the type of rational basis review required under *Lopez* is a deferential form of review. Citing *Lopez*, the *Coleman* Court held:

> In reviewing an act of Congress passed pursuant to the Commerce Clause, courts traditionally defer to Congress because '[t]he Commerce Clause grants Congress extensive power and ample discretion to determine its appropriate exercise.' *Lopez* 514 U.S. at ___, 115 S.Ct. at 1634 (Kennedy, J., concurring). The proper inquiry on review is 'whether a rational basis existed for [Congress] concluding that a regulated activity sufficiently affected interstate commerce.' *Id.* at ___, 115 S.Ct. at 1629.

Coleman, 78 F.3d at 157-58.

The *Coleman* Court went on to find the carjacking statute constitutional and distinguished it from the statute in *Lopez* because "the carjacking statute has none of the deficiencies noticed by the Supreme Court [in *Lopez*] – lack of any connection with commerce or economic enterprise, broadly defined; lack of a jurisdictional element; and lack of congressional findings on the nexus with interstate commerce." *Coleman*, 78 F.3d at 159.

In *United States v. Rawls*, the Fifth Circuit found 18 U.S.C. § 922(g), a federal statute prohibiting possession by a felon of a firearm shipped in interstate commerce, constitutional under the Commerce Clause. The Court in *Rawls* had the benefit of five other circuit court opinions on the same issue, each of which had concluded that Section 922(g) was constitutional under the Commerce Clause. In light of the extensive amount of persuasive

authority supporting the constitutionality of the statute, the Court declined to provide an exhaustive analysis of the issue. *See Rawls*, 85 F.3d at 242. The *Rawls* Court did, however, distinguish Section 922(g) from the GFSZA on the basis that Section 922(g) contained a jurisdictional element, which limited the regulated activity to possession of firearms that had previously traveled in interstate commerce. The Court held that "[c]entral to the Court's holding in *Lopez* was the fact that § 922(g) contained 'no jurisdictional element which would ensure, through a case-by-case inquiry, that the firearm possession in question affects interstate commerce.' " *Id.* (quoting *Lopez*, 514 U.S. at ___, 115 S.Ct. at 1631). Further, every case the Court cited in support of its ruling had justified the post-*Lopez* constitutionality of the statute on the existence of the statutory jurisdictional element. *See United States v. Sorrentino*, 72 F.3d 294, 296 (2d Cir.1995); *United States v. Bell*, 70 F.3d 495, 498 (7th Cir.1995); *United States v. Shelton*, 66 F.3d 991, 992 (8th Cir.1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1364, 134 L.Ed.2d 530 (1996); *United States v. Hanna*, 55 F.3d 1456, 1462 & n. 2 (9th Cir.1995); *United States v. Collins*, 61 F.3d 1379, 1383-84 (9th Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 543, 133 L.Ed.2d 446 (1995); *United States v. Bolton*, 68 F.3d 396, 400 (10th Cir.1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 966, 133 L.Ed.2d 887 (1996). *Rawls'* emphasis on the centrality of the jurisdictional element and the case law it relies on suggest that the presence of a jurisdictional element permits a finding of constitutionality, without the need to address the other two *Lopez* considerations.

In summary, the relevant inquiry post-*Lopez*, is "whether a rational basis existed for [Congress] to

conclude that a regulated activity sufficiently affected interstate commerce." *Coleman*, 78 F.3d at 157-58. The Court finds that this deferential standard can be met by a showing that the activity to be regulated satisfies any one of the *Lopez* considerations. This follows because each of the considerations appear to be sufficient to furnish the requisite nexus, *i.e.*, either the activity is connected with interstate commerce or an economic enterprise (*i.e.*, the traditional turf of the Commerce Clause), or Congress requires a nexus with interstate commerce in each case to assert jurisdiction over the activity, or there are Congressional findings that support the conclusion that a rational basis existed for Congress to conclude that the activity in issue substantially affects interstate commerce. It would be redundant to require a separate jurisdictional statement if a case involves clear-cut commercial activity for which the nexus with interstate commerce is obvious. Alternatively, if Congress expressly requires an effect on interstate commerce in each case to assert jurisdiction over a particular activity, Congressional findings are redundant. Moreover, it is clear from the structure of the *Lopez* opinion that a statute need not satisfy all three considerations to be constitutional. There would have been no need to discuss the third consideration, for example, if failure to meet either one of the first two were sufficient to condemn the statute. Applying these principles, the Court will now examine the validity of each of the statutes in issue.

D. The Validity of Section 1955 After *Lopez*

18 U.S.C. § 1955 reads in pertinent part:

> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both. (b) As used in this section – (1) "illegal gambling business" means a gambling business which – (I) is a violation of the law of a State or political subdivision in which it is conducted; (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day. (2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

18 U.S.C. § 1955.

Since the *Lopez* decision, one Circuit Court has reviewed the validity of 18 U.S.C. § 1955 under the Commerce Clause. In *United States v. Wall*, 92 F.3d 1444 (6th Cir.1996), the Sixth Circuit applied the *Lopez* substantial effects test and concluded that Section 1955 is constitutional because it is a regulation of an activity having a substantial relationship to interstate commerce. This Court agrees with that conclusion.

First, the Court notes, as did the *Wall* Court, that Section 1955, unlike the statute struck down in *Lopez*, has a commercial aspect to it:

> On its face, [Section 1955] has a commercial aspect. It does not prohibit gambling per se; rather, it punishes those who 'conduct[ ] . . . an illegal gambling business.' 18 U.S.C. § 1955(a) (emphasis added). To sustain a conviction, Congress required federal prosecutors to demonstrate that a certain amount of commercial activity took place – the business had to 'remain[ ] in substantially continuous operation for a period in excess of thirty days or ha[ve] a gross revenue of $2,000 in any single day.' *Id.* § 1955(b)(1)(iii). Gambling itself, in its multiple forms, is a commercial activity. . . . By its terms, § 1955 is commercial in nature and is not favorably compared to possession of a gun in a school zone, which clearly does not involve commercial activity.

Wall, 92 F.3d at 1449.

It is true that the statute does not contain an explicit jurisdictional requirement. However, unlike the GFSZA, Section 1955 contains much legislative historical information to guide the Court in its determination of the reasonableness of Congress' conclusion that illegal gambling has a substantial effect on interstate commerce. Congress passed Section 1955 as part of Title VIII of the Organized Crime Control Act of 1970 in an attempt to attack sophisticated, large-scale illegal gambling operations, which Congress thought to be a major source of funding for organized crime. Congress made the following explicit findings regarding the effect of illegal gambling operations on interstate commerce:

> The Congress finds that (1) illegal gambling involves widespread use of, and has an effect upon, interstate commerce and the facilities

> thereof; (2) illegal gambling is dependent upon facilities of interstate commerce for such purposes as obtaining odds, making and accepting bets, and laying off bets; (3) money derived from or used in illegal gambling moves in interstate commerce or is handled through the facilities thereof; (4) paraphernalia for use in illegal gambling moves in interstate commerce; and (5) illegal gambling enterprises are facilitated by the corruption and bribery of State and local officials or employees responsible for the execution or enforcement of criminal laws.

S.Rep. No. 91-617, 91st Cong., 1st Sess. 16 (1969).

Congress also "found that organized crime had developed complex channels through which ostensibly local gambling operations sent their revenues to central coffers." *United States v. Sacco*, 491 F.2d 995, 999 (9th Cir.1974) (citing President's Commission on Law Enforcement and Administration of Justice, Report: The Challenge of Crime in a Free Society 189 (1967) and Task Force Report: Crime and Its Impact – an Assessment 52-53 (1967)). Congress also concluded that large scale illegal gambling operations "distorted the production of goods for commerce and the flow of goods in interstate commerce." *Id.* (citing 116 Cong.Rec. 604 (1970) (remarks of Senator Allott), and 116 Cong.Rec. 35199 (1970) (remarks of Congressman St. Germain)). As the Fifth Circuit noted in *United States v. Harris*, "[t]he Congressional Record is filled with evidence to support the[se] conclusions. . . . " *Harris*, 460 F.2d at 1045 and n. 3 (noting that in considering passage of the Organized Crime Control Act of 1970,

Congress had before it the 1967 Report of President Johnson's Commission on Law Enforcement and the Administration of Justice).

Moreover, Congress's rationale offers a rational stopping point for the role of the federal government in regulating illegal gambling activities. Mindful of the Tenth Amendment and the rights of the states, Congress made a point of not regulating all illegal gambling activity, but rather only large scale operations that were likely to have a substantial impact on interstate commerce. This was the reason that Congress drafted the statute so that it covered only gambling businesses that "involve[ ] five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business" and that have "been or remain[ed] in substantially continuous operation for a period in excess of thirty days or has gross revenue of $2,000 in any single day." 18 U.S.C. § 1955(b)(ii) and (iii). This intention is evidenced by the following statement from the legislative history of Section 1955:

> The intent of . . . section 1955, below, is not to bring all illegal gambling activity within the control of the Federal Government, but to deal only with illegal gambling activities of major proportions. . . . The provisions of this title do not apply to gambling that is sporadic or of insignificant monetary proportions. It is intended to reach only those persons who prey systematically upon our citizens and whose syndicated operations are so continuous and so substantial as to be of national concern, and

> those corrupt State and local officials who make it possible for them to function.

1970 U.S.Code Cong. and Admin.News 4007, 4029.

In light of this extensive record, this Court cannot find that Congress was unreasonable when it determined that gambling businesses of the type regulated by Section 1955 have a substantial effect on interstate commerce. Nor does the Court find that acceptance of Congress's reasoning would lead to boundless federal power. In fact, this Court finds that Section 1955 was the result of reasoned findings concerning the impact of *large-scale, continuous* gambling operations on interstate commerce. Accordingly, the Court finds Section 1955 facially constitutional.

The Court also finds the statute to be constitutional as applied in this case. The Court agrees entirely with the analysis of the Sixth Circuit's majority in *Wall*, which found that Section 1955 was constitutional as applied to defendants who owned and operated an illegal business that leased video poker machines to various establishments, all of which were in the state of Tennessee. Even if, as defendant Goodson claims, the defendants' alleged behavior were totally local in nature, the as-applied challenge in this case would fail for the same reason the *Wall* Court gave for rejecting the as-applied challenges in that case. As the *Wall* Court concluded:

> In the case at hand, there was no evidence that defendants were engaged in a gambling enterprise that filled organized crime coffers. This case appears to be one of those 'rare instances where a gambling operation meeting

> the requirements of 1955 will be a local operation, in no way connected with organized crime.' *Sacco*, 491 F.2d at 1000. **Congress, however, may regulate commercial activities that, although intrastate in nature, comprise a class of activities that substantially affect interstate commerce. Courts may not excise individual instances of a class of commercial activities that is within the reach of federal power**. *Perez v. United States*, 402 U.S. 146, 154, 91 S.Ct. 1357, 1361, 28 L.Ed.2d 686 (1971); *see also Lopez*, 514 U.S. at ___, 115 S.Ct. at 1630. *Maryland v. Wirtz*, 392 U.S. 183, 192-93, 88 S.Ct. 2017, 2021-22, 20 L.Ed.2d 1020 (1968); *Wickard v. Filburn*, 317 U.S. 111, 127-28, 63 S.Ct. 82, 90-91, 87 L.Ed. 122 (1942); *United States v. Pack*, 16 F.3d 1222, No. 92-3872, 1994 WL 19945 at *2 (6th Cir. Jan. 25, 1994) (per curiam) (**"If the class of activities is within the reach of federal power and the regulation imposed is reasonable, a court's investigation is concluded. There is no need for inquiry on a case-by-case basis or proof that a particular activity had a [substantial] effect on commerce."**) (quoting *Sacco*, 491 F.2d at 999); *cf. [United States v.] Gomez*, 87 F.3d [1093] at 1095-96 [(9th Cir.1996)] (noting that once the commercial nature of the activity is established, the courts must consider the aggregate effect of the activity on the commercial market).

Wall, 92 F.3d at 1450-51 n. 14 (emphasis added). *See also, Lopez*, 514 U.S. at ___, 115 S.Ct. at 1629 ("where a *general regulatory statute bears a substantial relation to commerce, the de minimis* character of individual instances arising under that statute is of no consequence.") (emphasis in original).

Moreover, the Court is not convinced by defendant's argument that the "evidence will not support any theory that the video poker business at issue . . . engaged in any business which had even a minimal effect on interstate commerce." Record Doc. No. 65 at 17. If the government produces the evidence that it says it will, that evidence would show that defendant's alleged gambling business had significant interstate commercial aspects to it. Specifically, the government states that the evidence will show that: 1) the video poker machines essential to the operation were manufactured in another state; 2) the negotiations for the purchase of property for, and the construction of, future video poker locations involved interstate commerce; 3) the truck stop facility was required to have monthly fuel sales in an amount that implicates interstate commerce both as to the customers purchasing the fuel and the supplier providing the fuel; and 4) the truck stop facility was required to have a liquor license and restaurant facilities sufficient to handle a minimum of 50 persons and had agreements with national food suppliers to meet these requirements.

Accordingly, defendant Goodson's challenges to Section 1955 are rejected.

E. The Validity of Section 1956 After *Lopez*

Defendant Fred Goodson concedes that the federal money laundering statute, 18 U.S.C. § 1956, is different from both the GFSZA and from Section 1955 in that by its express terms it limits application of the statute to certain transactions that affect interstate or foreign commerce "in any way or degree" or involve the use of a financial

institution which is engaged in or affects interstate or foreign commerce "in any way or degree." 18 U.S.C. § 1956(c)(4)(A) and (B). Goodson submits that the presence of such a tenuous jurisdictional link between the offense conduct and interstate commerce is insufficient to meet the requirements of *Lopez*. The Court disagrees.

As discussed above, the Fifth Circuit's post-*Lopez* jurisprudence demonstrates the critical significance of a statutorily required jurisdictional nexus to the statute's validity *vel non* under the Commerce Clause. *See Rawls*, 85 F.3d at 242 ("[central to the Court's holding in *Lopez* was the fact that § 922(q) contained 'no jurisdictional element which would ensure, through a case-by-case inquiry, that the firearm possession in question affects interstate commerce.' "). Further, the Supreme Court has held that the presence of even a tenuous jurisdictional nexus is to be read to invoke the full extent of Congress's Commerce Clause power. *See Russell v. United States*, 471 U.S. 858, 859, 105 S.Ct. 2455, 2456, 85 L.Ed.2d 829 (1985). Thus, the Fifth Circuit, pre-*Lopez*, concluded that the minimal jurisdictional nexus requirement of Section 1956 was intended by Congress to invoke the full extent of Congress's power under the Commerce Clause. *See Gallo*, 927 F.2d at 822-23. The Court stated that:

> Section 1956 applies to conduct that 'in any way or degree affects interstate or foreign commerce.' 18 U.S.C. § 1956(c)(4). The legislative history of the Act indicates that this phrase was derived from the Hobbs Act, 18 U.S.C. § 1951, 'and is intended to reflect the full exercise of

> Congress's power under the Commerce Clause.' S.Rep. No. 433, 99th Cong.2d Sess. 13 (1986).

Id.

Other circuits have come to the same conclusion. *See, e.g., United States v. Peay*, 972 F.2d 71, 74 (4th Cir.1992) ("We . . . hold that, in enacting § 1956, Congress intended to exercise the full legislative power conferred by the Commerce Clause.") Since Section 1956 is therefore to be interpreted to invoke the full extent of Congress' Commerce Clause powers, whatever they may be, the issue remains whether the defendant's alleged behavior had the requisite connection to interstate commerce for it to be constitutionally regulated under this statute. The Court finds that it had the requisite connection.

Defendant Fred Goodson is charged with five counts (i.e., Counts 8-12) of money laundering in violation of Section 1956. All of those counts involve one or more National Banks. Every financial institution involved is federally insured. *See United States v. Green*, 964 F.2d 365, 375 (5th Cir.1992) ("At oral argument [defendant's] counsel admitted he had never heard of a bank that did not affect interstate commerce in some way; NOR HAVE WE."). Two of the transactions (i.e., Counts 9 and 11) involve institutions in two different states: Louisiana and Mississippi. All of the counts involve the proceeds of an allegedly illegal gambling business, which, in this Court's view, implicated interstate commerce.

Finally, the Court notes that Section 1956 is also constitutional under Congress's power to collect taxes. *See United States v. Jensen*, 69 F.3d 906, 910 n. 5 (8th Cir.1995) ("In enacting the money laundering statute,

Congress exercised its authority not only under the Commerce Clause, but also under its authority to collect taxes, duties, imposts and excises. The reasoning of *Lopez* does not apply."). The statute itself makes it illegal to knowingly "conduct or attempt[ ] to conduct . . . a financial transaction which in fact involves the proceeds of specified unlawful activity – (A)(I) with the intent to promote the carrying on of specified unlawful activity; or (ii) *with intent to engage in conduct constituting a violation of section 7201 of the Internal Revenue Code of 1986. . . .* " 18 U.S.C. § 1956 (emphasis added). The invocation of Section 7201 of the Internal Revenue Code is especially pertinent to this case, because all of the money laundering counts allegedly involve either conduct constituting an alleged violation of the Internal Revenue Code of 1986 (counts 8 and 9) or movement of the proceeds of those alleged Internal Revenue Code violations (counts 10 through 12). Congress is doubtlessly empowered to regulate such activity under both the Necessary and Proper Clause and Congress's taxing powers. Thus, while some money laundering cases might not implicate the part of the statute passed pursuant to Congress' taxing powers, this case clearly does.

Accordingly, Goodson's motion to dismiss Counts 8 through 12 of the indictment on the grounds that Section 1956 is both facially unconstitutional and unconstitutional as applied to this case is denied.

III. Defendant Fred Goodson's Motion to Dismiss All Mail Fraud Counts and All Racketeering Acts Predicated on Mail Fraud

Defendant Fred Goodson moves this Court to dismiss Counts 3, 4, 5, and 6 and Racketeering Acts 1a, 1b, 1c, and 1d from the Indictment, all of which allege violations of 18 U.S.C. § 1341, the federal mail fraud statute. At issue is a question that has yet to be decided by the Fifth Circuit: whether video draw poker licenses constitute the *"money or property"* required to support a mail fraud conviction. After a consideration of the arguments presented by both parties and the relevant law, the Court finds that video poker licenses constitute property for purposes of the mail fraud statute. Accordingly, the Court denies defendant Fred Goodson's motion to dismiss the counts and racketeering acts that are predicated on mail fraud.

A. Background

The federal mail fraud statute, 18 U.S.C. § 1341, provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service . . . shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1341 (emphasis added).

Indictment counts 3 through 6 and racketeering Acts 1a, 1b, 1c, and 1d charge defendant Fred Goodson, and others,[5] with:

> knowingly and willfully devis[ing] and intend[ing] to devise a scheme and artifice to defraud, and to obtain property by means of false and fraudulent pretenses and representations; that is, to defraud the State of Louisiana and its citizens by fraudulently obtaining and renewing, through the submission of false and incomplete information, state licenses to operate video poker sites for Truck Stop Gaming, Ltd.

Superseding Indictment at 26.

Defendant Fred Goodson argues that these charges must be dismissed because state licenses to operate video poker sites do not constitute "property" for purposes of 18 U.S.C. § 1341. Defendant relies heavily upon the Supreme Court decisions in *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), and *Carpenter v. United States*, 484 U.S. 19, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987).

B. Defining Property Under the Mail Fraud Statute

In *McNally*, the former chairman of the Kentucky Democratic Party orchestrated a scheme that steered state

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[5] Counts 3 through 6 charge defendants Carl Cleveland, Fred Goodson, and Maria Goodson with mail fraud. Counts 5 and 6 also charge defendant Joe Morgan with mail fraud. Racketeering acts 1a, 1b, 1c, and 1d incorporate the acts alleged in counts 3, 4, 5, and 6, respectively.

workman's compensation insurance contracts to an agency that agreed to share commissions with other insurance agencies specified by the former chairman. The trial court's jury instruction allowed for a conviction in the event that the jury found a scheme to defraud Kentucky and its citizens of the right to have the state's business conducted "honestly, impartially, free from corruption, bias, dishonesty, deceit, official misconduct, and fraud." *McNally*, 483 U.S. at 355 n. 4, 107 S.Ct. at 2878 n. 4. After a mail fraud conviction based on this instruction, the Supreme Court reversed, rejecting the application of the mail fraud statute to "schemes to defraud citizens of their intangible rights to honest and impartial government." *Id.*, 483 U.S. at 356, 107 S.Ct. at 2879. The Court held that the mail fraud "statute is limited in scope to the protection of property rights." *Id.*, 483 U.S. at 360, 107 S.Ct. at 2882. The Court concluded that "any benefit which the Government derives from the statute must be limited to the Government's interests as a property holder." *Id.*, 483 U.S. at 358 n. 8, 107 S.Ct. at 2881 n. 8.

After *McNally*, the Supreme Court held in *Carpenter v. United States* that Section 1341 encompasses intangible property as well as tangible property. *Carpenter*, 484 U.S. at 25, 108 S.Ct. at 320. Specifically, the Court found that a scheme to take the Wall Street Journal's publication schedule and the contents of its "Heard on the Street" column constituted a scheme to take "property" under the mail fraud statute. *Id.*

Congress also acted shortly after the *McNally* decision to lessen its impact by enacting 18 U.S.C. § 1346, which extends the reach of the mail and wire fraud statutes to include "[any] scheme or artifice to deprive

another of the intangible right of honest services." 18 U.S.C. § 1346. Defendant argues that the video poker licenses do not satisfy the mail fraud statute's property requirement under *McNally* and *Carpenter*, and that Section 1346 does not alter this result.[6] The Court finds that neither *McNally* nor *Carpenter* compels that conclusion because neither of them has anything to say on the specific issue of whether licenses constitute property.

Defendant also relies on a number of circuit court decisions that have held that state-issued licenses of various sorts are not property for purposes of Section 1341. *See United States v. Novod*, 927 F.2d 726, 728 (2d Cir.1991) (state dumping permit); *United States v. Schwartz*, 924 F.2d 410, 417-18 (2d Cir.1991) (arms export license); *United States v. Granberry*, 908 F.2d 278, 280 (8th Cir.1990) (school bus operator permit); *United States v. Kato*, 878 F.2d 267, 268-69 (9th Cir.1989) (pilot license); *Toulabi v. United States*, 875 F.2d 122, 125 (7th Cir.1989) (cab driver license); *United States v. Murphy*, 836 F.2d 248, 253-54 (6th Cir.), *cert. denied*, 488 U.S. 924, 109 S.Ct. 307, 102 L.Ed.2d 325 (1988) (bingo license); *United States v. Dadanian*, 856 F.2d 1391, 1392 (9th Cir.1988) (gambling license). These decisions all state that a license achieves property status only when it is in the hands of the licensee – i.e., that a license is without value to the state and therefore is not property

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[6] It is true that the government does not rely on Section 1346 as a basis for criminal liability in the indictment, since it did not charge defendant with depriving another of the intangible right to honest services. The Court notes, however, that Congress' action in passing Section 1346 demonstrates an intent to broaden the scope of what is considered property for purposes of the mail fraud statute.

before it is issued. Moreover, each of these decisions finds that in issuing the licenses, the state acted as a regulator not a property owner. For example, in the *Schwartz* decision, the Second Circuit found that an arms export license did not constitute property for purposes of the mail fraud statute because the license was simply a means of regulating the private use of private property. The Court stated:

> The government's interest in issuing its licenses ancillary to its regulatory program is no different than its interests in propounding and enforcing its other regulations with broad based applications that do not include the issuance of licenses. Whether it chooses to use licenses or blanket rules, the government's purpose is to control the private use of private property. Thus, a regulatory license is nothing more than a formal embodiment of 'the necessary government approval.'

Schwartz, 924 F.2d at 417 (internal citation omitted). *See also Toulabi*, 875 F.2d at 125. ("From the government's perspective, however, the [taxi cab] license is a promise not to interfere rather than a sliver of property. . . . [This] is a regulatory rather than property interest.").

In response to the defendant's arguments, the Government points to three decisions – in the First Circuit, the Third Circuit, and the Eastern District of Louisiana – which hold that licenses constitute property for purposes of the mail fraud statute. *See United States v. Bucuvalas*, 970 F.2d 937 (1st Cir.1992); *United States v. Martinez*, 905 F.2d 709, 712-14 (3d Cir.1990); *United States v. Carollo*, 1995 WL 505461 (E.D.La. Aug. 22, 1995) (video poker licenses in Louisiana) (appeal pending). In *Martinez*, the Third

Circuit found medical licenses to be property for purposes of the mail fraud statute. The Court rejected the argument that there is no loss of property by the state when it issues a license to someone in reliance on fraudulent information. The Court found no reason to draw an "esoteric distinction between an unissued and an issued license." *Martinez*, 905 F.2d at 715. The Court reasoned:

> This argument depends on the questionable statutory construction that someone who fraudulently acquires property that has great value once acquired, has not violated the mail fraud statute if the item acquired had no, or negligible, value in the hands of the victim. Nothing in the statutory language supports that theory. The statute, which proscribes 'obtaining money or property,' is broad enough to cover a scheme to defraud a victim of something that takes on value only in the hands of the acquirer as well as a scheme to defraud a victim of property valuable to the victim but valueless to the acquirer.

Id. at 713.

In *Bucuvalas*, the First Circuit likewise held that an entertainment and liquor license was property for the purposes of Section 1341. It was also unimpressed with the argument that the City's interest in the unissued licenses was not property:

> [G]iven the Court's expansive interpretation of the term 'property' in *Carpenter* . . . we believe the municipal government's interest in these alcoholic beverage and entertainment licenses was in the nature of a 'property' interest within the meaning of *McNally* and *Carpenter*. In its broadest sense, a 'property' interest resides in

> the holder of any of the elements comprising the 'bundle of rights' essential to the use or disposition of tangible property or to the exercise or alienation of an intangible right. For instance, in *Carpenter* the defendant held a possessory interest in the wrongfully-disposed confidential information, while the Wall Street Journal retained the right to control the manner of its use, dissemination, and alienation. Similarly, the City of Boston had the right to control the issuance of these licenses, in order to assure their issuance to deserving licensees only.

Bucuvalas, 970 F.2d at 945 (internal citations omitted). The Court went on to add that even if the licenses did not become property until they were issued, the city retained a right to control their alienation by the licensees, which was a property right, the deprivation of which could support a conviction for mail fraud. *Id.*

This Court agrees with the First and Third Circuit's conclusion that licenses constitute property even before they are issued. A distinction between an unissued and issued license belongs in the realm of metaphysics, not in a common sense application of the law. As one district court has held, "[t]o hold, as some courts have, that such valuable property vanishes when held in the hands of the issuer strikes the Court as preposterous." *United States v. Berg*, 710 F.Supp. 438, 444 (E.D.N.Y.1989) (internal citation omitted). The Court finds no reason to make distinctions of such pointless subtlety. The Court finds that video poker licenses are property and the challenged scheme deprived the state of its right to dispose of its property.

Further, although the Fifth Circuit has yet to rule on the matter, Fifth Circuit law strongly suggests that the

strained distinction between issued and unissued licenses should be rejected. In *United States v. Loney*, 959 F.2d 1332 (5th Cir.1992), for example, the Court rejected an argument from the defendant that frequent flyer coupons do not constitute property for purposes of the federal fraud statutes. The Court in *Loney* rejected the defendant's argument, noting that "we construe 'property' in a broad sense for purposes of the federal fraud statutes." *Id.* at 1336. Noting that the *McNally* Court defined property as "things of value," *see McNally*, 483 U.S. at 358, 107 S.Ct. at 2881, the court concluded that frequent flyer coupons were clearly "something of value" because they could be used to obtain free flight tickets. *Id.* The court remarked that "[i]f such coupons did not represent something of value, one wonders why [the defendant] went to such trouble to obtain and sell them." *Id.* at 1336 n. 8.

The defendant's argument that video poker licenses are not property in the hands of the State because they only take on value after they are issued applies equally in the context of frequent flyer coupons. Frequent flyer coupons generally have little to no value to the issuer and arguably take on value only after they are issued to a customer of the airlines. While the airlines cannot use the coupons themselves, the Fifth Circuit still found them to be property for purposes of the federal fraud statutes because they represent a "bundle of rights" that the airlines can dispose of as they see fit – the disposal of which significantly affects the airline financially. This Court finds no principled reason for making a distinction between issued and unissued licenses, especially when the Fifth Circuit has refused to make a distinction between issued and unissued frequent flyer coupons.

Accordingly, *Loney* provides another rationale for rejecting defendant's argument.

Moreover, as one court has noted, "[t]he view . . . that licenses are property in the hands of the licensees, but never in the hands of the government represents an inversion of historical fact." *United States v. Turoff*, 701 F.Supp. 981, 988 (E.D.N.Y.1988). As noted in a seminal article by Professor Charles Reich on the history of property rights, licenses and other forms of government largess were traditionally considered to be property that belonged to the state before it was given to private citizens:

> The chief obstacle to the creation of private rights in [government] largess [e.g., licenses, welfare benefits, services, contracts and franchises] has been the fact that it is originally public property, comes from the state, and made [sic] be withheld completely.

Charles Reich, The New Property, 73 *Yale L.J.* 733, 778 (1964). *See also Martinez*, 905 F.2d at 714; *Turoff*, 701 F.Supp. at 989-90 (Salutary fact that in modern times courts recognize property rights in licenses need not blind us to the fact that licenses originate in the state and are public property in the first instance.).

Furthermore, the Court finds that the facts of this case distinguish it from those cited by the defendant. As the government points out, the cases cited by the defendant focus on the State's lack of property interest in licenses solely involving the Government's exercise of a regulatory function. *See, e.g., Schwartz*, 924 F.2d at 417 ("The government's interest in issuing its licenses ancillary to its regulatory program is no different than its

interests in propounding and enforcing its other regulations with broad based applications that do not include the issuance of licenses."); *Toulabi*, 875 F.2d at 125 ("All the license signifies from the City's perspective is that the driver met the substantive criteria for the profession . . . nothing more. . . . [This] is a regulatory rather than property interest."). Video poker is different, however, in that the State of Louisiana is more than just a mere regulator of the video poker industry and has much more of a direct financial interest in the video poker licenses than the government entities did in the cases cited by the defendant.

It is noteworthy that until recently, the business of video poker was illegal in Louisiana. One of the main reasons for the recent legalization of video poker was that it was considered an ongoing source of revenue for the State. Accordingly, Louisiana has set strict requirements to insure that the State receives its pro rata share of video poker receipts. Under the provisions of La.R.S. 33:4862.11(D)(2), for example, there is a 22.5% mandatory "franchise payment" of net video poker revenues that must be paid by all licensees into the "state treasury."[7] The State protects its interest in these revenues by 1) connecting each operating video poker machine to a central State computer in Baton Rouge, which records all of

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[7] The Court notes that the Louisiana Legislature's use of the term "franchise" is significant in light of Louisiana jurisprudence. Under Louisiana law, a franchise conferred by a government subdivision upon a private entity has been termed "a valuable property right." *Washington-St. Tammany Electric Cooperative, Inc. v. St. Tammany Parish Police Jury*, 612 So.2d 773, 777 (La.App. 1st Cir.1992), *writ denied*, 614 So.2d 86 (1993).

the money taken in and paid out in winnings; 2) issuing licenses only to people who meet certain qualifications; and 3) making such licenses nontransferable. The Court finds that, in light of the State's continued control over and considerable financial stake in the video poker industry, video poker licenses under Louisiana law are significantly different than the taxi cab driver's licenses, pilot licenses, state dumping licenses, bingo licenses, and arms trade licenses that were at issue in the cases cited by the defendant.

The case of *Borre v. United States*, 940 F.2d 215 (7th Cir.1991), is instructive. In *Borre*, the Seventh Circuit held that the government had a property interest in a cable television franchise in spite of the Seventh Circuit's earlier holding in *Toulabi*, 875 F.2d at 125, that taxi licenses do not constitute government property. In distinguishing a cable television franchise from the taxi licenses in *Toulabi*, the *Borre* court concluded that "a cable television franchise represents far more than a mere 'promise not to interfere' by the government." *Borre*, 940 F.2d at 221 (quoting *Toulabi*, 875 F.2d at 125). The same could be said of the video poker licenses involved in this case.

As the government points out, under Louisiana law, when the state awards a video poker license, it is functionally equivalent to awarding a franchise from which the State receives a significant percentage of revenue and over which it continues to exercise a great deal of control. In light of the State's continued financial interest in each video poker license it issues, these video poker licenses are substantially different from regulatory licenses and should be considered property because the state acts more as a property owner than as a "mere regulator."

In arguing that the state has no property interest in video poker licenses, the defendant also relies on La.R.S. 33:4862.1(D), which provides that:

> Any [video poker] license applied for, granted, or issued under the provisions of this Part is a pure and absolute privilege. . . . Any license issued or renewed under the provisions of this Part is not property or a protected interest under the constitutions of either the United States or the state of Louisiana. La.R.S. 33:4862.1(D).

The Court does not agree with the defendant that this statute mandates a finding that the licenses are not property for purposes of the mail fraud statute. First, the Court notes that when determining whether something constitutes property for purposes of the federal fraud statutes, courts must look not only to state statutes, but also to "traditional property law." *See Martinez*, 905 F.2d at 713; *Carollo*, 1995 WL 505461 at *2. Under traditional property law, owners of licenses are generally considered to have a protective property interest. *Id.* (citing *Mackey v. Montrym*, 443 U.S. 1, 10, 99 S.Ct. 2612, 2617, 61 L.Ed.2d 321 (1979); *Beauchamp v. DeAbadia*, 779 F.2d 773, 775 (1st Cir.1985); *Keney v. Derbyshire*, 718 F.2d 352, 354 (10th Cir.1983); *Kudish v. Bradley*, 698 F.2d 59, 61 (1st Cir.1983)); *cf. In re National Cattle Congress, Inc.*, 179 B.R. 588, 593 (N.D. Iowa 1995) (dog racing license constitutes property of estate in bankruptcy), *appealed on other grounds*, 91 F.3d 1113 (8th Cir.1996); *In re Crescent City Capital Development Corp.*, No. 95-12735-B, 95-12736-B at 7-11 (E.D.La. Oct. 2, 1995) (riverboat gaming license constitutes property of estate in bankruptcy).

Moreover, the Court notes that the Supreme Court and the Fifth Circuit have both stated that property is to be interpreted broadly for purposes of the federal fraud statutes. *McNally*, 483 U.S. at 356, 107 S.Ct. at 2880 (citing *Durland v. United States*, 161 U.S. 306, 16 S.Ct. 508, 40 L.Ed. 709 (1896)); *Loney*, 959 F.2d at 1335-36.[8] That the Louisiana State Legislature has decided to deprive video poker licensees of a property interest in the context of 22:4862.1(D) does not mean that federal courts must apply that deprivation in all contexts. *Cf. Loney*, 959 F.2d at 1335-36 (recognizing that courts can construe things as property in one context but as not property in another). Congress could have expressly made the definition of property in Section 1341 completely dependent on state law definitions of property, but it chose not to do so. Consequently, the Court must look to traditional property law as well as state law in making its determination. Traditional property law clearly suggests that video poker licenses constitute property.

In any event, this Court concludes that the existence of La.R.S. 22:4862.1(D), if anything, hurts the defendant's position that the State has no property interest in the video poker licenses in that the statute is designed to limit the property rights of the licensees, so as to give the State a stronger interest in the licenses even after they are issued. In attempting to limit the property rights of video poker licensees through La.R.S. 22:4862.1(D), the State

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[8] As noted above, Congress, in passing 18 U.S.C. § 1346, also expressed its desire that courts should interpret property broadly for purposes of the federal fraud statutes. *See* note 6, *supra*, and accompanying text.

has made clear its intent to have video poker licensees act as if they were franchisees, thus protecting the State's significant financial interest in the industry. The statute reflects that the State wanted to keep to itself as much of an interest in the licenses as possible.

Finally, the Court rejects defendant Goodson's argument that federalism concerns are implicated by this motion. In short, since the Court finds that the video poker licenses in question are property for the purposes of Section 1341, the Court concludes that this is not "an unwarranted intrusion by the federal government into the conduct of state affairs," as defendant describes it. Record Doc. No. 66 at 16. Nor are comity concerns significantly implicated here because this interpretation of the mail fraud statute does not criminalize conduct that would otherwise be legal under state law. *See* La.R.S. 27:309(A) (providing criminal penalties for false statements intentionally made on video poker license applications).

The Court finds that the mail fraud charges in the superseding indictment are not facially invalid, as defendant suggests, and denies defendant Fred Goodson's motion to dismiss all mail fraud counts and to dismiss all racketeering acts alleging mail fraud violations. Accordingly,

IT IS ORDERED that defendant Goodson's motion to dismiss racketeering acts 1a, 1b, 1c, 1d and Counts 3, 4, 5, and 7 is hereby DENIED.

IT IS FURTHER ORDERED that defendant Goodson's motion to dismiss racketeering acts 2a, 2b, 2c, 2d, 2e and Counts 7, 8, 9, 10, 11, and 12 is hereby DENIED.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	CRIMINAL ACTION
VERSUS	NO. 96-207
CARL CLEVELAND, ET AL.	SECTION "R"

ORDER DENYING MOTIONS FOR ACQUITTAL BY DEFENDANTS CARL W. CLEVELAND, FRED H. GOODSON, MARIA F. GOODSON AND LARRY BANKSTON AND DENYING MOTIONS FOR NEW TRIAL BY DEFENDANTS CARL W. CLEVELAND, FRED H. GOODSON, MARIA F. GOODSON AND LARRY BANKSTON

(Filed Aug. 26, 1997)

Before the Court are four separate motions for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29 filed by defendants Carl W. Cleveland, Fred H. Goodson, Maria F. Goodson, and Larry Bankston and four separate motions for a new trial pursuant to Federal Rule of Criminal Procedure 33 filed by defendants Carl W. Cleveland, Fred H. Goodson, Maria F. Goodson, and Larry Bankston. For the reasons stated below, all eight motions are DENIED.

I. BACKGROUND

This political corruption case involved six separate defendants, each of whom was charged with illegal activity in the video poker industry in Louisiana. The defendants were former Louisiana State Senators Benjamin

"B.B. Sixty" Rayburn and Larry S. Bankston; video poker entrepreneur, Fred H. Goodson; Mr. Goodson's attorney, Carl W. Cleveland; Mr. Goodson's Accountant, Joe H. Morgan; and Mr. Goodson's daughter, Maria F. Goodson. The superseding indictment charged each of the defendants with some combination of the following 19 counts: racketeering (Count 1); racketeering conspiracy (Count 2); mail fraud (Counts 3 through 6); conducting an illegal gambling business (Count 7); money laundering (counts 8 through 12); tax conspiracy (Count 13); false declaration under penalty of perjury (Count 14); aiding and abetting a false declaration under penalty of perjury (Count 15); and interstate communications in aid of racketeering (Counts 16 through 19).

On June 27, 1997, after a trial that lasted approximately six weeks and deliberations that lasted for more than seven days, the jury returned a verdict in this case. The jury found four of the defendants — Carl Cleveland, Fred Goodson, Maria Goodson, and Larry Bankston — guilty of certain counts and not guilty of others. The remaining two defendants — B.B. Sixty Rayburn and Joe Morgan — were found not guilty on all counts.

Each of the four convicted defendants moves this Court, pursuant to Rule 29 of the Federal Rules of Criminal Procedure, for a judgment of acquittal on all counts on the grounds that no reasonable juror could have found them guilty beyond a reasonable doubt of any of the charges based on the evidence presented at trial. The Government opposes these motions and argues that the evidence was more than sufficient for a reasonable juror to convict the defendants on each of the counts as to which they were found guilty.

Each of the four convicted defendants alternatively moves this Court, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, for a new trial. The motions for a new trial revolve predominantly around the asserted impropriety of remarks made by Assistant United States Attorney Michael Magner in his closing arguments. The Government opposes the motions for a new trial on the grounds that Mr. Magner's remarks were appropriate and that to the extent that they were inappropriate, there was no prejudice. The Court now resolves these issues as follows.

II. DISCUSSION

A. Motions for Judgment of Acquittal

1. Standard of Review

In deciding a motion for a judgment of acquittal under Fed. R. Crim. P. 29, this Court must "determine whether, viewing the evidence and the inferences that may be drawn from it in the light most favorable to the verdict, a rational jury could have found the essential elements of the offenses beyond a reasonable doubt." *United States v. Sneed*, 63 F.3d 381, 385 (5th Cir. 1995), *cert. denied sub nom, Polley v. United States*, ___ U.S. ___, 116 S. Ct. 712, 133 L. Ed. 2d 667 (1996); *United States v. Pruneda-Gonzalez*, 953 F.2d 190, 193 (5th Cir.), *cert. denied*, 504 U.S. 978, 112 S. Ct. 2952, 119 L. Ed. 2d 575 (1992). Thus, to grant a judgment of acquittal, the Court must conclude, after viewing the evidence in the light most favorable to the Government, that a rational jury would have to have had entertained a reasonable doubt as to the defendant's guilt. *See United States v. Burns*, 597 F.2d 939,

941 (5th Cir. 1979) (formulating the standard as "determin[ing] whether, viewing the evidence in the light most favorable to the Government, the jury *must necessarily* entertain a reasonable doubt as to the guilt of the defendant") (emphasis added). "It is not necessary that the evidence exclude every rational hypothesis of innocence[1] or be wholly inconsistent with every conclusion except guilt, provided a reasonable trier of fact could find the evidence establishes guilt beyond a reasonable doubt." *Pruneda-Gonzalez*, 953 F.3d at 193; *see also, Glasser v. United States*, 315 U.S. 60, 80, 62 S. Ct. 457, 469, 860 L. Ed. 680 (1942); *United States v. Chavez*, 947 F.2d 742, 744 (5th Cir. 1991); *United States v. Bell*, 678 F.2d 547, 549 (5th Cir. 1982) (*en banc*), *aff'd*, 462 U.S. 356, 103 S. Ct. 2398, 76 L. Ed. 2d 638 (1983). However, if the evidence "gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence," the conviction must be reversed. *United States v. Salazar*, 66 F.3d 723, 728 (5th Cir. 1995).

The same test applies whether the Government's case depends on direct or entirely circumstantial evidence. *United States v. Lorence*, 706 F.2d 512, 518 (5th Cir. 1983);

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[1] The standard set forth by defendants Fred Goodson and Carl Cleveland for determining a motion for judgment of acquittal — namely, whether, in the light most favorable to the Government, a reasonable man might find the evidence inconsistent with every reasonable hypothesis of innocence — was explicitly rejected by the Fifth Circuit *en banc* in 1982. *See United States v. Bell*, 678 F.2d 547, 549 (5th Cir. 1982) (*en banc*), *affirmed on other grounds*, 462 U.S. 356, 103 S. Ct. 2398, 76 L. Ed. 2d 638 (1983); *see also United States v. Del Aguila-Reyes*, 722 F.2d 155, 156-57 (5th Cir. 1983).

Burns, 597 F.2d at 941. In applying the test, the Court must view the evidence, including all reasonable inferences drawn therefrom and all credibility determinations, in the light most favorable to the guilty verdict. *United States v. Salvatore*, 110 F.3d 1131, 1136 (5th Cir. 1997); *United States v. Resio-Trejo*, 45 F.3d 907, 910 (5th Cir. 1995). Any conflicts in the testimony must be resolved in the Government's favor. *Burns*, 597 F.2d at 941.

In applying this test to each of the convictions of Maria Goodson, Larry Bankston, Carl Cleveland, and Fred Goodson, the Court concludes that there was sufficient evidence upon which a jury could have based a guilty verdict for each count. The Court will address each of the defendants' motions in turn.

2. Maria Goodson

Maria Goodson was charged in 16 of the 19 counts of the Superseding Indictment with offenses ranging from racketeering (Count 1) and racketeering conspiracy (Count 2) to mail fraud (Counts 3 through 6), conducting an illegal gambling business (Count 7), money laundering (Counts 8 through 12), tax conspiracy (Count 13), aiding and abetting a false declaration under penalty of perjury (Count 15), and interstate communications in aid of racketeering (Count 16). She was acquitted by the jury of all but a single count of mail fraud (Count 6). The Count 6 mail fraud charge involved the sending, by mail, of Truck Stop Gaming, Ltd.'s 1995 video poker owner/operator's license renewal application to the Louisiana State Police and the receipt, by mail, of the 1995 video poker owner/

operator's license by Truck Stop Gaming, Ltd. from the Louisiana State Police.

To sustain Maria Goodson's mail fraud conviction on Count 6, "the Government had to prove: (1) the existence of a scheme to defraud, (2) the use of the mails to execute the scheme, and (3) the specific intent on the part of the defendant [ ] to commit fraud.[2] *Salvatore*, 110 F.3d at 1136 (citing *United States v. Fagan*, 821 F.2d 1002, 1008 (5th Cir. 1987)). It is uncontested that the Government has met its burden of proof in this case as to the second element, the use of the mails to execute the alleged scheme. The Court finds that there is sufficient evidence for the jury to have found that the Government satisfied its burden of proof beyond a reasonable doubt as to the first and third elements as well.

Count 6 of the superseding indictment alleges that Truck Stop Gaming Ltd.'s 1995 license renewal was fraudulently obtained from the State of Louisiana by submitting false and incomplete information on applications and related affidavits submitted to the Louisiana State Police.[3] Specifically, Count 6 of the superseding indictment

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[2] There is no specific intent requirement regarding the use of the mails for mail fraud. *Sneed*, 63 F.3d at 385; *United States v. Massey*, 827 F.2d 995, 1002 (5th Cir. 1987). "The test to determine whether a defendant cause [sic] the mails to be used is whether the use was reasonably foreseeable. The defendant need not intend to cause the mails to be used." *Massey*, 827 F.2d at 1002. There must only be specific intent, therefore, to commit a scheme to defraud in which the defendant contemplated that the mails would likely be used. *Id.*

[3] Under Louisiana law, video poker licenses are issued by the Louisiana State Police. *See* La. R.S. § 27:301 *et seq.* (1997).

charges that Maria Goodson filed, and caused to be filed, with the Louisiana State Police "applications, affidavits, and other documents" in connection with the 1995 license renewal application for Truck Stop Gaming, Ltd., which concealed and failed to disclose (1) understandings and agreements with Fred Goodson, Carl Cleveland, and/or others: a) pledging and assigning interests in Truck Stop Gaming, Ltd. to them; b) agreeing to hold interests in Truck Stop Gaming, Ltd. for them as an "agent, nominee or otherwise"; and/or c) agreeing to transfer interests in Truck Stop Gaming, Ltd. on some future date to them; and (2) other factors that could impact the ability of the true owners to obtain licenses. *See* Superseding Indictment at 26-27.

There were two potential schemes underlying Count 6: (1) failing to disclose to the State Police a "hidden ownership" interest in Truck Stop Gaming, Ltd. held by Fred Goodson and Carl Cleveland, which was disguised by putting the business in the names of Fred Goodson's children, Maria Goodson and her brother Alex Goodson, and (2) failing to disclose to the State Police a "hidden ownership" interest in Truck Stop Gaming, Ltd. held by Bennie Rayburn, Jr. and eventually transferred to BAJ, LLC, a limited liability company wholly owned by the three grown children of defendant Rayburn. The Court finds that the jury could have found Maria Goodson guilty beyond a reasonable doubt of Count 6 on either or both theories.

a. Fred Goodson and/or Carl Cleveland's Hidden Ownership

The evidence introduced at trial showed that Fred Goodson and Carl Cleveland (through his law firm, Cleveland, Barrios, Kingsdorf & Casteix) put up all of the start of capital for Truck Stop Gaming, Ltd. They did so by providing each of the Goodson children some $245,000 for the business in 1992, ostensibly as loans, for which no money was every collected as repayment. Cleveland's law firm, at Fred Goodson's direction, drafted all of the paper work for the company and structured it on paper as a limited partnership, with Maria and Alex each as 49% limited partners and as sole shareholders of the 2% corporate general partner, Truck Stop Gaming, Inc. Fred Goodson was named the general manager of Truck Stop Gaming, Inc., through which he maintained control over Truck Stop Gaming, Inc.; and since Truck Stop Gaming, Inc., was the general partner of Truck Stop Gaming, Ltd., Fred Goodson also maintained control over Truck Stop Gaming, Ltd. Maria Goodson worked for her father at Truck Stop Gaming, Ltd.'s Slidell video poker facility, the O'Aces Video Poker Lounge.

When viewed in the light most favorable to the Government, the evidence also showed that the Louisiana State Police required disclosure of the ownership of *all* video poker license holders on license applications. *See* Testimony of Lieutenant Riley Blackwelder; Summary Testimony of Special Agent Kenneth Gross; Transcript of Judiciary B hearing held May 23, 1995.[4] This is clear from

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[4] While the defense presented contradictory evidence that ownership interests of less than 5% did not have to be disclosed,

the face of the applications themselves and from the Affidavit of Full Disclosure, which all license applicants were required to sign and notarize. When there was a 5% or greater ownership interest, the State Police would conduct a background investigation of the owners, which included contact with the Internal Revenue Service and a financial background check. *Id.* The 1995 renewal application submitted on behalf of Truck Stop Gaming, Ltd. showed Alex and Maria Goodson, along with Truck Stop Gaming, Inc. (in which Alex and Maria were listed as the sole owners), as the 100% owners of Truck Stop Gaming, Ltd. *See* Government Exhibit 41, 1995 Truck Stop Gaming, Ltd. License Application.

The Affidavit of Full Disclosure in connection with the application for the 1995 renewal of the license for Truck Stop Gaming, Ltd., which was signed by and sworn to by Maria Goodson and mailed to the State Police, represented to the State Police, in pertinent part, that:

- Maria was or was going to be "the sole beneficial owner of any direct or indirect interest in or to" Truck Stop Gaming, Ltd. except as was reflected on Truck Stop Gaming, Ltd.'s 1995 license renewal application.
- Maria had "no agreements or understandings (written or oral) with any other person and no present intent to hold as agent, nominee, associate, third party or otherwise any direct or indirect interest whatsoever in or to" Truck Stop Gaming, Ltd.

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such conflicts in the evidence must be resolved in the Government's favor under the standard for Rule 29 motions for acquittal. *See Burns*, 597 F.2d at 941.

- Maria had "no agreements or understandings with any other person and no present intent to transfer at any future time any interest whatsoever in or to" Truck Stop Gaming, Ltd.

See Government Exhibit 41, Affidavit of Full Disclosure Signed by Maria Goodson in 1995 License Renewal Application for Truck Stop Gaming, Ltd.

There is significant evidence from which the jury could have concluded that this information from the Affidavit of Full Disclosure was false. First, in an April 10, 1995 recorded conversation between Fred Goodson, Carl Cleveland, and Joe Morgan about how to deal with various tax concerns for Truck Stop Gaming, Ltd., Carl Cleveland asks Joe Morgan "[W]hat would happen if we, if we move the income [*i.e.*, of Truck Stop Gaming, Ltd.] to the returns of the, of the, of eventual, or the true owners?" Government Exhibit T26A (Tab 11) at 8. Morgan's response indicates that he understood Cleveland to mean that Fred Goodson and Carl Cleveland are the "eventual" or "true" owners of Truck Stop Gaming, Ltd. *See id.* (Morgan responds by saying to Cleveland, " . . . I don't know what Fred's circumstances gonna be. . . . And you, you . . . "). In fact, in this same conversation, Morgan also referred to Goodson and Cleveland as the "individual true owners", *id.*, and said that "it was [his] understanding that this was gonna be cleaned up . . . that it was all gonna be taken . . . taken, taken back out of the kid's names" before 1995. *Id.* at 7-8. Neither Cleveland nor Goodson, who were the people most likely to know the truth about who owned Truck Stop Gaming, Ltd., corrected Morgan.

At another point in this same conversation, Cleveland told Morgan that Alex and Maria Goodson have "executed promissory notes and pledge agreements of their partnership interests" to Fred Goodson and Carl Cleveland. *Id.* at 4. Cleveland suggested that "at some point in time," he and Fred Goodson needed to "exercise on the pledge" and "take over the ownership." *Id.* Once again, Fred Goodson did not correct Cleveland when he made references to an "executed pledge." The parties ultimately decided, in this conversation, that a formal transfer to Goodson and Cleveland would take place as of January 1, 1995. *Id.* The jury could have concluded, based on this conversation, that Fred Goodson and Cleveland were the "true owners" of Truck Stop Gaming, Ltd. or, at the very least, that there was an executed pledge or a present intention and mutual understanding to transfer the ownership of the company to them. Any of these conclusions would support a finding that the Affidavit of Full Disclosure signed by Maria Goodson contained material misrepresentations about the present and/or future planned ownership of Truck Stop Gaming, Ltd.

Second, in a July 7, 1995 conversation, Fred Goodson and his son Alex Goodson had a heated argument concerning Alex's role in Truck Stop Gaming, Ltd. in which there are repeated references to Carl Cleveland's interest in the video poker business. *See e.g.*, Government Exhibit T55A (Tab 70) at 13-14 (Alex Goodson: "Why does Carl Cleveland have an interest?" . . . Fred Goodson: "Carl Cleveland put up the money to do this."); *id.* at 16 (Fred Goodson: "He, I didn't give anything to Carl Cleveland."

Alex Goodson: "Well, he owns half of Truck Stop Gaming." Fred Goodson: "He put up half the money Alex." (emphasis added)).

Third, Carl Cleveland made repeated representations to people that he and/or his law firm had either an ownership interest, an "informal call", an "option", or a "pledge" of Maria Goodson's partnership interest in Truck Stop Gaming, Ltd. to secure what he described as a loan by his law firm to Maria to use for her capital contribution to the business. For example, in a June 30, 1993 memorandum from Carl Cleveland and several of his law partners to Mr. Gregory C. Sibley of the First National Bank of Commerce, Mr. Cleveland and his partners represented to Mr. Sibley that the Cleveland law firm's $245,000 loan to the Goodson children to set up Truck Stop Gaming "is convertible to a 49% partnership interest at our option." Government Exhibit 106 at 7. Likewise, in an October 21, 1993 letter from Carl Cleveland to attorney Robert Henderson, Mr. Cleveland represented that the Cleveland law firm "has acquired an indirect interest in Truck Stop Gaming, Louisiana licensed gaming operation company for $245,000." Government Exhibit 113 at 13. Furthermore, in a January 11, 1994 letter from Carl Cleveland to John F. O'Reilly of Jack Pot Enterprises, Inc., Mr. Cleveland affirmatively represented to Mr. O'Reilly that both he and Fred Goodson "hold a pledge of [Alex and Maria Goodson's] partnership interests to secure our cash advances on which no payments have been made as of this date." Government Exhibit 112. In a February 16, 1995 letter from Carl Cleveland to Mr. Gasper Occhipinti, Mr. Cleveland asks Mr. Occhipinti to "represent the ownership interest of my law firm" in

reference to a project of Truck Stop Gaming's. Government Exhibit 107.

Finally, in an August 24, 1994 memorandum from Carl Cleveland to the partners of his law firm, Mr. Cleveland stated that the firm "funded an acquisition in Truck Stop Gaming with cash and time," and that the firm has "an informal oral call on 49% of Truck Stop Gaming for [the firm's] $245,000 loan to Maria Goodson." See Government Exhibit 115 at 18-20. Cleveland indicated there were already agreements to convey 17.15% of this interest to others. *Id.* Cleveland's statements to his partners also provide evidence of his control over Truck Stop Gaming, Ltd.'s income inconsistent with that of a mere lender: "Fred and I have agreed that the current income stream will be used to expand to as many truck stop facilities as we can. . . . " *Id.*

While Mr. Cleveland testified that he was "mistaken" about his potential option, pledge, and/or ownership interest in Truck Stop Gaming, Ltd., it is clear that the jury did not find that testimony credible. It is not this Court's place to make credibility determinations on a motion for judgment of acquittal. *Salvatore*, 110 F.3d at 1136; *Resio-Trejo*, 45 F.3d at 910. There was sufficient evidence from which the jury could have reasonably concluded that there was an understanding between the relevant parties that Truck Stop Gaming, Ltd. was being held by the Goodson children for the "true owners," Fred Goodson and Carl Cleveland, to be placed openly in their names when they said so.

Evidence of the nature of Truck Stop Gaming Ltd's business dealings also supports such a conclusion. These

were not arms-length business transactions. Rather, they were agreements between a dominant parent, his adult children and a long-time friend of the family. A jury could have reasonably concluded that such an understanding had been reached even though no formal "pledge" or "option contract" had been produced.

Finally, there was evidence from which the jury could have concluded that Carl Cleveland and Fred Goodson saw reporting the ownership in their own names to the State Police as a "problem." *See* Government Exhibit T28 (Tab 17) at 4 (Cleveland complaining to Fred Goodson about waking up in the middle of the night thinking about the "problem with having to report ownership changes to the State Police"). For whatever reason, whether it was to avoid having an inquiry made into Carl Cleveland's tax or financial history, which the evidence revealed to have been troubled, or to avoid having an inquiry made into the bankruptcy of a company owned by Fred Goodson, the jury could have concluded that defendants Carl Cleveland and Fred Goodson sought to hide their ownership from the State Police and that Maria Goodson knowingly helped them do so.[5]

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[5] That the State Police could have done suitability checks on Fred Goodson and/or Carl Cleveland because loans from them to Truck Stop Gaming, Ltd. were disclosed is irrelevant. What is relevant is that the jury could have concluded that the defendants *believed* that if they were listed as owners, they were *more likely* to be investigated and that they hoped that they could avoid a (thorough) suitability investigation of Fred Goodson and/or Carl Cleveland by listing the children as the owners. Moreover, the jury could have concluded that the scheme was reasonably calculated to deceive a person of ordinary prudence. *United States v. Finney*, 714 F.2d 420, 423 (5th Cir.

Furthermore, there were several recorded conversations involving Maria Goodson from which the jury could have reasonably concluded that she had knowledge that she and her brother were not the true owners of Truck Stop Gaming, Ltd. as she affirmed in the affidavit she submitted to the Louisiana State Police. For example, in an April 13, 1995 conversation between Maria Goodson and Carl Cleveland, Maria Goodson said, " . . . Mr. Morgan called and said that daddy wanted to reorganize things and so on and so forth and take it out of his name. . . . I'll take a cut in salary if you would give me, you know, one percent, you know, as an incentive. . . . " Government Exhibit T29 (Tab 20) at 5. The jury reasonably could have concluded that Maria was suggesting that she would give up some of her salary in exchange for a one percent ownership interest in the partnership — a suggestion that belies the defendants' claims that she was, in fact, already a 50% owner of the partnership at that time.[6] Moreover, in this same conversation, Maria Goodson and Carl Cleveland talked about keeping Truck Stop Gaming Ltd. in Alex and Maria's name "for the moment" and attempting to convince Fred Goodson to leave most of his interest in Alex and Maria's name while

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1983). Even if the State Police had the right to investigate lenders as well as owners, it does not necessarily follow that it was reasonable to investigate lenders in every case.

[6] Even counsel for Maria Goodson concedes that this statement is "ambiguous." *See* Memorandum in Support of Motion for Judgment of Acquittal on Count 6 of the Superseding Indictment at 8. On a motion for judgment of acquittal, the Court is required to interpret ambiguous evidence in the light most favorable to the Government. *See Salvatore*, 110 F.3d at 1136.

retaining control through a family partnership. *Id.* at 5-6. The jury reasonably could have concluded from this conversation that Maria Goodson knew that her father was ultimately to own the family business and/or that she was just a nominee for him. Finally, the jury could have reasonably concluded from a conversation between Maria Goodson and Kitty Cleveland on July 7, 1995, that Maria Goodson was aware that her brother Alex was not a true 50% owner of Truck Stop Gaming, Inc., the general partner of Truck Stop Gaming, Ltd. *See* Government Exhibit 2A. In that conversation, dealing with a planned meeting of the Goodson family with Cleveland to deal with Truck Stop Gaming's problems with the State Police, Maria Goodson stated that, "We need to remove Alex from the . . . from everything. . . . I don't even think it's worth mentioning to him. I mean the decisions that we make we'll make on our own and then we can just tell him." Government Exhibit T55B (Tab 65) at 3-4. In light of these conversations, the jury could have reasonably concluded that Maria Goodson had the requisite intent to defraud the Louisiana Police by failing to disclose the true owners of Truck Stop Gaming, Ltd. on Truck Stop Gaming, Ltd.'s 1995 renewal application.

b. BAJ, LLC's Hidden Ownership

The evidence also showed that on August 1, 1994, Truck Stop Gaming, Ltd. transferred a 4.99% interest to Bennie Rayburn through a document signed by Maria Goodson. *See* Government Exhibit 14. In a document entitled "Sale of Partnership Interest and Pledge Agreement," Maria Goodson agreed to "assign, sell, convey and deliver unto Benjamin B. Rayburn, Jr. a 4.99% interest out

of a 100% interest in the Truck Stop Gaming, Ltd. partnership. . . . " *Id.* The transfer of this interest was not reported to the State Police in Truck Stop Gaming, Ltd.'s 1995 license renewal application even though the evidence showed that such minority purchases were required to be reported. *See* May 23, 1995 Transcript, Sgt. Brad Tullier's Remarks Before the Senate Judiciary B Committee at 18; Testimony of Lieutenant Riley Blackwelder; Summary Testimony of Special Agent Kenneth Gross.

That Maria Goodson was aware of the transfer of ownership is indicated by two pieces of evidence. First, Maria signed the conveyance itself, transferring 4.99% of the partnership to Bennie Rayburn, Jr. Second, in a recorded May 23, 1995 conversation between Maria Goodson and Joe Morgan, Maria explicitly described BAJ, LLC, a limited liability company to which Bennie Rayburn transferred his 4.99% interest, as having had become a "4.9 percent partner." Government Exhibit T44A (Tab 38) at 5.

The defendants argue that the agreement with Bennie Rayburn, Jr. was not a transfer of a partnership interest and that the jury was not free to reach this conclusion because it is legally erroneous. According to the defendants, the "BAJ transaction"[7] was merely a conveyance of a 4.99% interest in the partnership's income stream from its video poker operations at the O'Aces Video Poker

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[7] While the original transfer of the 4.99% interest was to Bennie Rayburn, it was eventually transferred to BAJ, LLC, a limited liability company owned by Senator Rayburn's three children.

Lounge in Slidell, Louisiana. The Court does not agree. The language of the agreement clearly states that Maria Goodson was selling Bennie Rayburn, Jr. "a 4.99% interest out of a 100% interest in Truck Stop Gaming, Ltd." Government Exhibit 14 at 1. The agreement further states: "The partnership interest conveyed herein is a limited partnership interest. . . . " *Id.* While the agreement purported to limit Bennie's financial interest to "the assets of and the profit or loss from the operations conducted by the partnership in Slidell, Louisiana, at the Slidell 76 Auto/Truck Plaza," Government Exhibit 14 at 2, this does not mean that it was not an agreement to sell a partnership interest.

Under Louisiana law, there are no hard and fast rules in determining whether a partnership exists; rather, each case must be considered on its own facts. *Harris v. Wallette*, 538 So. 2d 728, 732 (La. App. 2d Cir. 1989). The agreement here clearly fulfilled the "three elements of a partnership: (1) mutual consent of the partners, (2) sharing of profits and losses, and (3) each party must have a proprietary interest in the property of the enterprise." *Id.* at 730; *see also Williams v. Trapolin Law Firm*, 641 So. 2d 673, 676 (La. App. 4th Cir. 1994). That the agreement limited Bennie Rayburn's interest to a single video poker site is of no moment. "The 1980 revision comments accompanying [Louisiana Civil Code] article 2803 provide that: 'The partners have complete freedom to contract regarding the manner and extent to which they are to participate in the profits, benefits, assets, and losses of the partnership. If the parties agree, the participation

may be unequal, and it may differ among the four categories, namely, profits, benefits, assets, and losses.' " *Hibernia Nat'l Bank v. Carner*, 997 F.2d 94, 100 n. 10 (5th Cir. 1993).

The Court finds that there was sufficient evidence from which a reasonable jury could have convicted Maria Goodson of Count 6. The jury could have reasonably concluded that she knowingly signed false documents for submission to the State Police, which were facially inconsistent with statements made in both intercepted conversations in which she took part and in documents drafted by her co-defendants. Accordingly, Maria Goodson's motion for a judgment of acquittal must be denied.

3. Larry Bankston

Larry Bankston was charged in 5 of the 19 counts of the Superseding Indictment: racketeering (Count 1), racketeering conspiracy (Count 2), and three separate counts of interstate communications in aid of racketeering in violation of the Travel Act (Counts 17-19). Bankston was acquitted by the jury of Counts 1, 2, and 19 and was convicted of two counts of committing and/or aiding and abetting interstate communications in aid of racketeering, Counts 17 and 18. Count 17 involved an interstate telephone call on June 20, 1995 from Fred Goodson to Meyer Realty to set up what was alleged to have been a bribe in the form of a "sham" rental of Larry Bankston's Gulf Shores condominium. Count 18 involved Fred Goodson's use of an interstate commercial carrier on June 22, 1995 to forward a $1,555.01 check to Meyer Realty as payment for the condominium rental.

The essential elements of the Travel Act, 18 U.S.C. § 1952 (1997), are:

> (1) travel or use of the mail or any facility in interstate or foreign commerce;
>
> (2) with the specific intent to promote, manage, establish, or carry on — or distribute the proceeds of — unlawful activity; and
>
> (3) knowing and willful commission of an act in furtherance of that intent subsequent to the act of travel or use of the mail or facility of interstate or foreign commerce.

See, e.g., United States v. Logan, 949 F.2d 1372, 1380-81 (5th Cir. 1991), *cert. denied*, 503 U.S. 975, 112 S. Ct. 1597, 118 L. Ed. 2d 312 (1992), *cert. denied*, 504 U.S. 925, 112 S. Ct. 1982, 118 L. Ed. 2d 580 (1992); *United States v. Hernandez-Palacios*, 838 F.2d 1346, 1350 (5th Cir. 1988); *United States v. Carrion*, 809 F.2d 1120, 1127 (5th Cir. 1987); *United States v. Cauble*, 706 F.2d 1322, 1351 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005, 104 S. Ct. 996, 79 L. Ed. 2d 229 (1984).

Bankston contests both of his convictions on essentially three separate grounds: 1) no reasonable jury could have concluded that Bankston had the requisite intent to be influenced in his official conduct by the condominium rental; 2) no reasonable jury could have concluded that the condominium rental was anything more than a legal gift to Bankston; and 3) no reasonable jury could have concluded that Bankston committed an overt act in furtherance of the alleged bribery after the interstate communications at issue. The Court rejects each of Bankston's contentions and finds that there was sufficient evidence from which a reasonable jury could have convicted Bankston of both Count 17 and Count 18.

Under Louisiana law, "public bribery is the direct or indirect acceptance or offer to accept anything of apparent present or prospective value by a person who has been elected or appointed to pubic office with the specific intent to be influenced in his conduct in relation to his employment position, or duty." Court's Final Instructions to the Jury at 38; La. R.S. 14:118 (1997). There was sufficient evidence from which a reasonable jury could have concluded that the condominium rental was a bribe in the form of a "sham" transaction.

The evidence showed that in a February 17, 1995 recorded conversation between Bankston and his wife concerning the money needed to maintain the Gulf Shores condominium they had purchased, the couple agreed that what they needed to do to help the financing is "to get us some um, travel-less renters." Government Exhibit T51A (Tab 2) at 4. The evidence also supported the conclusion that "travel-less renters" referred to an arrangement of the type alleged in the superseding indictment for Counts 17 and 18, whereby the proposed "renter" paid to use the condominium, but intentionally did not go. In a July 7, 1995 conversation, Bankston proposed such a "travel-less" arrangement to lobbyist Darrell Hunt:

> Larry Bankston: Uh, if – what Lynn talked about doing with the condo. Are you still able to talk about doing that?. . . . We, it's reserved as an owner's thing.
>
> Darrell Hunt: Um hum.

> Larry Bankston: What I would do is ask y'all to (clears throat) - I would release it, let you rent it, and you just don't go.

Government Exhibit T86 (Tab 86) at 1-2.

The evidence was sufficient for the jury to have concluded that Bankston had a similar arrangement with Fred Goodson regarding the rental of the Gulf Shores condominium. Goodson paid for the rental on the condominium by check. *See* Government Exhibit 48B. This check was credited by Meyer Realty to the Bankston's account. *See* Government Exhibit 214, Meyer Real Estate Rental Statement. FBI surveillance showed that the Bankston family, not Goodson, used the condominium during the week in question. *See* Testimony of special Agent Clifford Chatham; Testimony of special Agent Larry Jones. Moreover, conversations between Fred Goodson and Bankston could be interpreted as indicating that Bankston and Goodson were both aware that Goodson was not going to actually use the condominium even though he paid to rent it. *See, e.g.*, Government Exhibit T49 (Tab 51) at 1-3 (Goodson makes arrangements to leave package for Bankston at condominium instead of bringing package himself); Government Exhibit T43D (Tab 50) at 21 (June 20 conversation in which Goodson asks Bankston to call him "whenever you get back").

Moreover, the record contains a number of conversations between Bankston and others in which Bankston indicates that he will use the power of his office to protect Goodson's video poker interests during the legislative session. For example, on December 28, 1994, Bankston tells Fred Goodson that he views "his job" as making sure

that "there's no piece of legislation passed period." Government Exhibit T18 (Tab 1) at 19. From the context of the conversation, the jury could have concluded that Bankston was referring to preventing the passage of local option legislation concerning video poker. *See id.* (Bankston, referring to "his job" says that "they might want to put it this uh vote, uh on whether you continue period." Goodson responds by saying, "Uh huh and that would hurt."). Likewise, in a May 19, 1995 conversation between Larry Bankston and video poker lobbyist Joe Wood concerning Bankston's role in a conference committee concerned with the video poker local option bill, Bankston indicated that he had "gone too far and done too much to flinch" concerning local option and that he was willing to take a "blood oath to do whatever it takes to either have no local option, which, or have the local option that he and I believe we can live with, which is, just has the words local option and not meaningful." Government Exhibit T43 (Tab 37) at 17; *see also* Government Exhibit T43c (Tab 48) at 5-7 (Cleveland and Goodson discussing on June 20, 1995 how Bankston had "really lead the fight" . . . had "really stood in there for us" . . . "and when this conference bill came back . . . he made emergency runs back to the back sort of to fine tune it."). The jury could have reasonably found that the condominium rental was a sham, which was set up to pay Bankston for his support of legislation favorable to Goodson's video poker interests.

Furthermore, a June 17, 1995 conversation between Fred Goodson and lobbyist Lynn Berry reasonably supports a conclusion that the condominium rental during

the week of June 24, 1995 was a bribe. In that conversation, Goodson and Berry talk about getting a "truck load" of stuff for Bankston to thank him for "what Bankston has done for us [*i.e.*, the video poker industry]." Government Exhibit T43B (Tab 47) at 1-3. Shortly after discussing a plan to give Bankston "a thousand, fifteen hundred dollars" of stuff, Goodson says to Berry:

> Fred Goodson: You know what I just did though, didn't you?
>
> Lynn Berry: Uh huh. . . .
>
> Fred Goodson: Ah, you remember that, remember him going to Florida last year?
>
> Lynn Berry: Yeah.
>
> Fred Goodson: Well I'm doing that again.
>
> Lynn Berry: Wonderful. (Pause).
>
> Freed Goodson: And, and he's goin be down there the 24th.
>
> Lynn Berry: Wonderful.

Government Exhibit T43B (Tab 47) at 4. A reasonable jury could have concluded from the June 17, 1995 conversation that Goodson knew that Bankston, and not he, was actually going to use the condominium that week.

The June 17, 1995 conversation between Fred Goodson and Lynn Berry also belies Bankston's position that there was no proof of Bankston's specific intent to be influenced in his official conduct by the condominium rental. Bankston argues that the evidence showed that Goodson first called Meyer Realty about the condominium rental on June 20, 1995, after the legislative session

was over. According to Bankston, because the legislative session was over at the time the arrangements for the condominium rental were made, "[t]here was nothing for Bankston to do for Goodson with respect to his official duties" and the rental therefore could not have been a bribe because it could not have been accepted with the intent of influencing Bankston's official duties. Bankston's Memorandum in Support of Motion for Judgment of Acquittal at 1.

However, the June 17, 1995 conversation between Fred Goodson and Lynn Berry is evidence that the agreement for the payment of the condominium rental fee by Goodson was made prior to the end of the legislative session. In particular, the June 17, 1995 conversation is evidence that the condominium agreement between Goodson and Bankston was struck prior to the conclusion of the business of the conference committee concerning which Bankston indicated he would take a "blood oath" to prevent any meaningful local option from passing. *See* Government Exhibit T43 (Tab 37) at 17 ("blood oath" remarks). In the beginning of the June 17, 1995 conversation, Goodson reveals to Berry his plan to have Bankston "go to Florida [sic][8]" again that year. *See* Government Exhibit T43B (Tab 47) at 4. Later on in the conversation, Goodson makes a remark that clarifies the sequence of

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[8] Bankston's condominium is actually located in Gulf Shores, Alabama, not far from the Florida border. The jury could have reasonably concluded that Goodson was referring to the Gulf Shores condominium even though it is not in Florida. In fact, Bankston's counsel even mistakenly referred to the Gulf Shores condominium as being in Florida at several points throughout the trial.

events. In response to Berry's suggestion that Goodson and Berry should deliver a "truck load" of stuff to Bankston's house because of Bankston's help to the video poker industry, Goodson advises Berry that he "oughta do it before all this stuff happens. Before the conference committee and all that stuff." *Id.* at 5-6. The jury reasonably could have concluded that the condominium arrangement was made before the conference committee finished its business and that it was a bribe in exchange for Bankston's help in defeating legislation antagonistic to Goodson's interests.

Bankston's assertion that there was no proof of his intent to be influenced is also contradicted by evidence of tape recorded conversations following the legislative session during which Bankston and Goodson discussed Bankston's future role in defeating legislation adverse to Goodson's interests. Within minutes after Goodson called Romar Place Apartments — the call that was the basis for Count 17 — Bankston and Goodson spoke on the phone and evaluated the outcome of the legislative session from the standpoint of the video poker industry. They also discussed Bankston's future role in helping the video poker industry politically:

> Larry Bankston: . . . Fred thank you for all your help.
>
> Fred Goodson: Yo-yo-yo, well thank you, I mean we haven't done anything. Thank you and, and we're here for anything else we need to do.
>
> Larry Bankston: Appreciate it.
>
> Fred Goodson: And uh . . .

> Larry Bankston: . . . we need to get started with talkin about this politics stuff and . . .
>
> Fred Goodson: . . . well we need your leadership in that. You need to give us some direction of which way to go. I know ya got your hands full, but uh, we wanna . . .
>
> Larry Bankston: . . . well I'm gonna spend a lot time tryin to get, be involved in electing people and things like that. . . .

Government Exhibit T43D (Tab 53) at 22.

Bankston further expressed a willingness to go to bat for video poker in a July 20, 1995 conversation, in which he explained to Fred Goodson that:

> Larry Bankston: . . . [T]here's an issue of, of uh, leadership in the Senate. And there is a possibility, the only way you're going to protect gaming, I think, is to have the right committee. Do what we did before, keep the, the committee in such a way that we don't get things out on the floor that hurt us. We we work it and deal with it in the committee and that kind of stuff, because I think we are not going to be able to be in control of the legislature unless we are making some dramatic changes or have the right governor.

Government Exhibit T50B (Tab 79) at 7. When the evidence is taken as a whole, it was reasonable for the jury to conclude that Bankston's willingness to "do what we did before" by "keep[ing] the committee in such a way that we don't get things out on the floor that hurt us," *id.*, was a commitment to protect video poker against adverse legislation that had been obtained by Goodson's bribe.

Ultimately, Bankston's position that no reasonable jury could have found that Bankston intended to be influenced in his official conduct with respect to the condominium rental fails because proof of specific intent need not be direct. *See* Court's Final Jury Instructions at 39-40. Rather, specific "intent may be determined from all of the evidence in the case." *Id.* Bankston has not shown that no reasonable jury could have concluded that the condominium rental was a sham transaction used by him to exchange his political influence for money disguised as rent. His motion for judgment of acquittal therefore cannot be granted on the grounds that there was a lack of proof of intent to be influenced.

The Court is also unpersuaded by Bankston's argument that no reasonable jury could have concluded that the condominium rental transaction was anything more than a "gift." Bankston's counsel did not even argue this at trial or include it as a theory of defense. Further, while a gift may differ from a bribe, what is styled a gift can be a bribe if all of the elements of bribery are met. *See* La. R.S. 14:118 (1997), Reporter's Comments ("The bribe need not be direct; it may be hidden under the semblance of a sale, wager, payment of debt, or in any manner designed to cover the true intentions of the parties."); *see generally* Black's Law Dictionary 191 (6th ed. 1990) (defining bribery as "*[a]ny gift*, advantage, or emolument offered, given, or promised to, or asked or accepted by, any public officer to influence his behavior in office.") (citing Model Penal Code § 240.1) (emphasis added). In any event, as detailed above, there was ample evidence from which the jury could have found that the condominium transaction violated the Louisiana bribery statute.

Bankston's "gift" argument is further weakened because, in addition to the above-cited evidence, there was other evidence that the jury could have found inconsistent with the idea that the transaction was a mere "gift." For example, there was evidence from which the jury could have concluded that Goodson was aware that the condominium transaction was illegal. When initially approached by the FBI, Goodson denied knowledge that Bankston was the owner of the condominium. Tape recorded conversations, which were admitted at trial, showed that Goodson was not telling the truth. *See, e.g.*, Government Exhibit T46 (Tab 49) at 1; Government Exhibit T50A (Tab 52) at 2. The efforts of a defendant to falsely exculpate himself may be considered by the jury as evidence of consciousness of guilt. *Wilson v. United States*, 162 U.S. 613, 16 S. Ct. 895, 40 L. Ed. 1090 (1896); *United States v. Livingston*, 816 F.2d 184, 194 (5th Cir. 1987); *United States v. Brown*, 604 F.2d 347, 351 n. 2 (5th Cir. 1979), *cert. denied*, 445 U.S. 962, 100 S. Ct. 1649, 64 L. Ed. 2d 237 (1980). Furthermore, that Bankston's wife had the payment returned to Goodson after the FBI investigation became public could be viewed as inconsistent with the assertion that the money was all along an innocent gift to Bankston.

In summary, a reasonable jury was not required to find that this transaction was a gift because there was sufficient evidence from which it could have concluded that the condominium rental was a sham transaction designed to disguise a bribe. *See United States v. Green*, 964 F.2d 365, 370 (5th Cir. 1992) (holding that there was sufficient evidence for the jury to conclude that campaign loans were shams designed to disguise bribes).

Bankston's third contention, that there is no proof that he committed any overt act in furtherance of bribery after the interstate communications in question, is meritless. This is true especially in light of the fact that Counts 17 and 18 each charged Bankston with committing *and/or aiding and abetting* interstate communications in aid of racketeering. The "overt act" requirement of 18 U.S.C. § 1952 is met as to Count 17 by the actions charged in Counts 18 and/or 19 — namely, Fred Goodson's use of an interstate carrier to send $1,555.01 from Slidell, Louisiana to Meyer Realty in Alabama with the intent of having it credited to Larry Bankston's account (Count 18) and Fred Goodson's June 23, 1995 interstate telephone call to Sue Negus of Meyer Realty to confirm that she received the envelope with the rental payment in it (Count 19). As the charge against Bankston was *aiding and abetting* interstate communications, it is sufficient that Bankston knowingly promoted the bribery scheme with Goodson and knew that interstate communications and/or travel would be involved in the scheme. *See United States v. Logan*, 949 F.2d 1370, 1380-83 (5th Cir. 1991), *cert. denied*, 503 U.S. 975, 112 S. Ct. 1597, 118 L. Ed. 2d 312 (1992), *cert. denied*, 504 U.S. 925, 112 S. Ct. 1982, 118 L. Ed. 2d 580 (1992) (rejecting challenge that there was no overt act to support Travel Act conviction on grounds that evidence was sufficient to show defendant aided and abetted co-defendants' interstate travel). As to Count 18, the overt act requirement is satisfied by the interstate telephone call from Fred Goodson to Sue Negus that was the basis for Count 19.

As discussed above, the jury reasonably could have concluded that the condominium rental was a sham

transaction designed to disguise a bribe. The jury could have reasonably inferred that, by making this arrangement with Goodson, Bankston "caused" Goodson to make the interstate mailing and interstate telephone call that were the subject of Counts 18 and 19. Because of 18 U.S.C. § 2, Bankston need not have been actually involved in the interstate telephone calls and/or mailings to be found guilty under the Travel Act, and it suffices if there was evidence that he aided and abetted those who made the calls and/or mailings. *See United States v. Holcomb*, 797 F.2d 1320, 1328 (5th Cir. 1986).

In any event, there was evidence that Bankston was aware that Goodson was going to use Federal Express, an interstate commercial carrier, to mail the check for the condominium "rental" to Meyer Realty and that Bankston agreed to the use of such an arrangement. In a June 22, 1995 telephone conversation between Bankston and Fred Goodson, the following exchange took place:

Larry Bankston: FRED?

Fred Goodson: Hi. I'm FEDERAL EXPRESSing that ah to, to Meyer Realty.

Larry Bankston: Uh-huh.

Fred Goodson: Uh, today.

Larry Bankston: Oh, okay.

Fred Goodson: And I was putting ah, I probably wouldn't see, I, I probably wouldn't see, I was going to put, I've got something I wanted ah to leave for you to pick up there.

Larry Bankston: Okay.

> Fred Goodson: Do you have any problem if I put ah an envelope in there that says to Mr. LARRY BANKSTON, Baton Rouge, owner Unit Six, Oh three Romar Beach, Alabama, please hold, to be picked up.
>
> Larry Bankston: That'd be fine.

Government Exhibit T49 (Tab 51) at 1. Clearly, the Federal Expressing of the check on or about June 22, 1995 — the basis for Count 18 — satisfied the overt act requirement as to Bankston's conviction for Count 17.

There was also evidence that Bankston knew Goodson would make interstate telephone calls to Meyer Realty and that he prompted at least one such call. For example, at one point in the above quoted June 22, 1995 conversation between Bankston and Fred Goodson, Bankston followed up on the issue of the package with the check, by asking Goodson "did you talk over to the MEYER's people and tell them this [*i.e.*, the package with the check in it] is coming." Government Exhibit T49 (Tab 51) at 3. At the end of the June 22 conversation, Goodson informed Bankston that he was going to call Sue Negus of Meyer Realty again to "tell her that I'm putting a package in there. That you're going to pick it up for me as long as . . . as well as pick up my key." *Id.* at 6. The jury could have reasonably concluded from this conversation that Bankston knew about and aided and abetted Goodson's call to Sue Negus on June 23, the basis of Count 19. This call satisfies the overt act requirement for Bankston's conviction on Count 18.

Moreover, that both Goodson and Bankston were acquitted of Count 19 does not mean that the telephone call that was the subject of that count cannot be the overt

act for the conviction on Count 18. The overt act requirement does not require the Government to prove that the subsequent action constituted a separate crime; rather, an act "promoting, managing, establishing, or carrying on" the unlawful activity suffices. *See United States v. Winslow*, 962 F.2d 845, 852 (9th Cir. 1992); *United States v. Jenkins*, 943 F.2d 167, 173 (2d Cir. 1991); *United States v. Johns*, 755 F. Supp. 130, 133 (E.D. Penn. 1991). The law is clear that arrangements to effect payment are sufficient to meet this element. *See United States v. Garrett*, 716 F.2d 257, 266 (5th Cir. 1983); *United States v. Craig*, 573 F.2d 455, 489 (7th Cir. 1977).

In the end, none of Bankston's three grounds for judgment of acquittal are supported by the evidence. Accordingly, Bankston's motion for judgment of acquittal must be denied.

4. Fred Goodson and Carl Cleveland

Fred Goodson was charged in 18 of the 19 counts of the Superseding Indictment with offenses ranging from racketeering (Count 1) and racketeering conspiracy (Count 2) to mail fraud (Counts 3 through 6), conducting an illegal gambling business (Count 7), money laundering (Counts 8 through 12), tax conspiracy (Count 13), false declaration under penalty of perjury (Count 14), and interstate communications in aid of racketeering (Counts 16-19). Fred Goodson was convicted by the jury of Counts 1, 2, 5, 6, 8, 9, 10, 11, 12, 16, 17, and 18 and was acquitted by the jury of Counts 3, 4, 7, 13, 14, and 19.

Carl Cleveland was charged in 15 of the 19 counts of the Superseding Indictment with offenses ranging from racketeering (Count 1) and racketeering conspiracy (Count 2) to mail fraud (Counts 3 through 6), conducting an illegal gambling business (Count 7), money laundering (Counts 8 through 12), tax conspiracy (Count 13), aiding and abetting false declaration under penalty of perjury (Count 15), and interstate communications in aid of racketeering (Count 16). Cleveland was convicted by the jury of Counts 1, 2, 5, 6, 8, 9, 10, 12, 13, and 15 and was acquitted by the jury of Counts 3, 4, 7, 11, and 16.

Both Fred Goodson and Cleveland now contend that each of their respective convictions should be set aside because there was not sufficient evidence for any of them. The Court disagrees. As Fred Goodson and Cleveland were convicted of eight of the same counts and Cleveland has adopted Fred Goodson's motion for judgment of acquittal as to those eight counts, the Court will address these defendants' motions together.

a. Mail Fraud (Fred Goodson and Cleveland Counts 5 and 6)

As pointed out above, to sustain a conviction of mail fraud, "the Government had to prove: (1) the existence of a scheme to defraud, (2) the use of the mails to execute the scheme and (3) the specific intent on the part of the defendants to commit fraud." *Salvatore*, 110 F.3d at 1136. Neither Fred Goodson nor Carl Cleveland contests that the second element, *i.e.*, the use of the mails, was satisfied here. As to the first element, the existence of a scheme to defraud, the Court has already found that the jury could

have reasonably found the existence of such a scheme. *See* Discussion of Maria Goodson's Mail Fraud Conviction, *supra*.[9] That discussion of the evidence also refers to evidence of conduct by Goodson and Cleveland bearing on the third element, *i.e.*, the specific intent of these defendants, and it will not be repeated in detail here. *See* discussion at pp. 12-25, *supra*. Based on that evidence and the evidence discussed below, the Court finds that there was sufficient evidence for the jury to find the requisite intent to defraud as to both Fred Goodson and Carl Cleveland.

As described above, there was ample evidence that Fred Goodson and Carl Cleveland were "calling the shots" and making the business decisions as to Truck Stop Gaming, Ltd. According to the defendants, it was Fred Goodson and Cleveland who were the driving force behind setting up Truck Stop Gaming, Ltd. If there was a scheme to defraud by hiding the true ownership or intended ownership of Truck Stop Gaming, Ltd., as the Court has found there was sufficient evidence for a jury

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[9] The defendants were all charged to be a part of the same scheme to defraud. While the discussion, *supra*, concerning Maria Goodson's conviction was limited to her conviction on Count 6, the same general analysis applies to Count 5, in that the 1994 renewal application involved in Count 5 made essentially the same representations as the 1995 renewal application involved in Count 6. *Compare* Government Exhibit 9 (Truck Stop Gaming, Ltd. 1994 renewal application) to Government Exhibit 41 (Truck Stop Gaming, Ltd. 1995 renewal application). However, the Court notes that the analysis pertaining to the hidden ownership of BAJ, LLC applies only to Count 6.

to reasonably conclude, there was clearly sufficient evidence that Cleveland and Fred Goodson directed it.

Moreover, the defendants' statements support a finding that there was intent to defraud. These statements indicate that Fred Goodson and Cleveland were aware of the reporting requirements Truck Stop Gaming, Ltd. was operating under and that neither of their interests was reported, either as actual or intended owners. Both Fred Goodson and Cleveland were parties to the April 10, 1995 conversation in which the parties indicated that their plan had been to transfer Truck Stop Gaming, Ltd. out of the children's names to that of "true owners" as of January 1, 1994. *See* Government Exhibit T26A (Tab 11). They also indicate their knowledge that this had not been disclosed to the state police in the 1994 application. *See* T28 (Tab 17) at 8; *see also, id.*, at 4. Further, even though they agreed to make the transfer effective January 1, 1995, this is still not disclosed to the state police in the 1995 application. Their conversations also reveal their knowledge that failing to report ownership changes to the gaming authorities is a "problem." Government Exhibit T28 (Tab 17) at 8; *see also, id.* at 4. In addition, in a May 15, 1995 conversation between Fred Goodson and Carl Cleveland, Goodson makes it clear that the license renewal application to be filed in 1995 explicitly required Truck Stop Gaming, Ltd. to disclose 100% of its ownership, including "any new partners." Goodson states that the instructions say to disclose 100% of Truck Stop Gaming, Ltd.'s ownership, and Cleveland does not contradict him. When Goodson says what about "XYZ LLC, out of Baton Rouge," a reference that the jury could have reasonably concluded referred to BAJ, LLC out of Baton Rouge,

Cleveland simply suggests that they should not disclose it. Cleveland does not say it would be legal not to disclose the ownership interest of the LLC — and Goodson never asks if it would be. Cleveland merely suggests that they should leave the information out and "treat that like a consultant's fee or something for now," to which Goodson agrees. Government Exhibit T16G (Tab 35A) at 1-3 (emphasis added).

This conversation need not be interpreted, as counsel for Fred Goodson did, as evidence of Goodson's good faith reliance on the advice of counsel. The jury was free either to accept or reject that theory of defense. Finally, Special Agent Freddie Cleveland testified that when he interviewed Cleveland on August 16, 1995, Cleveland stated that it would be illegal if Truck Stop Gaming's license renewal application did not disclose an interest by BAJ. *See* Testimony of Freddie Cleveland. This evidence could lead a reasonable jury to conclude that Cleveland was aware of the consequences of telling Goodson "we oughta leave that out for now" instead of disclosing the interest of "X, Y, Z, LLC out of Baton Rouge." The Court finds that there was sufficient evidence for the jury to have concluded that Goodson and Cleveland had the requisite intent to commit mail fraud.

b. Money Laundering (Fred Goodson Counts 8-12; Cleveland Counts 8-10 & 12)

Fred Goodson's sole argument for judgment of acquittal on his money laundering convictions, which was adopted by Cleveland as his sole argument, is that

the mail fraud convictions against him are infirm, making it impossible for a reasonable jury to have found that he laundered money in furtherance of the mail fraud. Having found that a reasonable jury could have convicted defendants Fred Goodson and Carl Cleveland of mail fraud, the Court is not persuaded by this argument. In any event, the Court finds that there was sufficient evidence to support each of the money laundering convictions of Fred Goodson and Carl Cleveland.

To secure a conviction for money laundering, "the government must prove that the defendants (1) knowingly conducted a financial transaction (2) that involved the proceeds of an unlawful activity (3) with the intent to promote or further that unlawful activity." *United States v. Garza*, ___ F.3d ___, 1997 WL 400812 at *5 (5th Cir. July 16, 1997); *United States v. Thomas*, 12 F.3d 1350, 1360 (5th Cir.), *cert. denied*, 511 U.S. 1095, 114 S. Ct. 1861, 128 L. Ed. 2d 483 (1994), *cert. denied*, 511 U.S. 1114, 114 S. Ct. 2119, 128 L. Ed. 2d 676 (1994).

There is ample evidence that the defendants conducted all of the financial transactions described in Counts 8 through 12 of the superseding indictment. *See* Government Exhibits 32D, 36A, 36B-1, 36B-2, 37A-1, 37A-2, 59A, 60A, 60B, 61A, and 61B. Furthermore, in light of the Court's ruling regarding the sufficiency of the evidence concerning the mail fraud counts, it is clear that there was sufficient evidence for the jury to have concluded that the money in question was the proceeds of a specified illegal activity. The transactions in Counts 8 through 12 dealt with approximately $1.3 million in taxable income generated by Truck Stop Gaming, Ltd. in 1994. As the Court has found that there was sufficient

evidence to conclude that Truck Stop Gaming, Ltd.'s 1994 video poker license was obtained through a mail fraud scheme, there was sufficient evidence for the jury to have concluded that the money laundered in each of the counts were the proceeds of an illegal activity.[10]

Finally, the evidence was sufficient for the jury to have concluded that each of the transactions in Counts 8 through 12 was performed by Fred Goodson and Carl Cleveland with the intent to promote mail fraud. The transactions were all the product of what was dubbed the "brainstorming session" at trial — an April 10, 1995 conversation among Fred Goodson, Carl Cleveland, and Joe Morgan concerning how to eliminate approximately $1.3 million in taxable income from Truck Stop Gaming, Ltd.'s books for 1994. Government Exhibit T26A (Tab 11). The Court finds that the jury could reasonably have concluded from the content of this conversation and from the deposits of the checks for $370,160 and $412,024 into the account of Truck Stop Gaming, Ltd. that Cleveland and Fred Goodson decided to perform these transactions so as to further the mail fraud scheme which enabled Truck Stop Gaming, Ltd. to operate.[11]

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[10] The Court notes that as to Counts 8 and 9, the "specified unlawful activity" could have alternatively been conduct in violation of Section 7206 of the *Internal Revenue Code*. As to defendant Cleveland, the Court also finds that there was sufficient evidence for the jury to have drawn such a conclusion. *See* discussion, *infra*, tax convictions of Carl Cleveland.

[11] In addition, as to *Counts 8 and 9, the evidence was* sufficient for the jury to conclude that Carl Cleveland performed the transactions with the intent to promote a violation of Section 7206 of the Internal Revenue Code. *See* discussion of tax counts, *infra*.

c. Tax Conspiracy (Cleveland — Count 13)

Carl Cleveland was charged and convicted of tax conspiracy pursuant to 18 U.S.C. § 371. Specifically, the superseding indictment charged that Cleveland and his co-defendants, "in order to evade penalties due and owing on approximately $1,350,000.00 of income earned by Truck Stop Gaming, Ltd. . . . ", "created and caused to be created" bills for sham legal and management fees. Superseding Indictment at 32.

"To find a conspiracy violation under 18 U.S.C. § 371, a jury need only find an agreement between two or more persons to violate the law and an overt act by one member of the conspiracy in furtherance of the conspiracy. A specific agreement need not be shown, but may be inferred from concert of action." *United States v. Frydenlund*, 990 F.2d 822, 825 (5th Cir. 1993), *cert. denied*, 510 U.S. 868, 114 S. Ct. 192, 126 L. Ed. 2d 150 (1993), *cert. denied*, 510 U.S. 928, 114 S. Ct. 337, 126 L. Ed. 2d 287 (1993) (citing *United States v. Magee*, 821 F.2d 234, 239 (5th Cir. 1987)). The Court finds that there was sufficient evidence to convict Cleveland of tax conspiracy.

The evidence in this case showed that, in 1994, the accountant for Truck Stop Gaming, Ltd., Joe Morgan, did not file quarterly tax returns on behalf of Alex and Maria Goodson showing the net income generated by the limited partnership based upon his understanding that the partnership was to be put in the names of the "true" or "intended" owners, Fred Goodson and Carl Cleveland before the end of the year. *See* Government Exhibit T25 (Tab 8) at 3. On April 10, 1995, Morgan informed both

Fred Goodson and Carl Cleveland in a recorded telephone conversation that leaving the ownership in the name of the children would generate "substantial penalties" as a result of the failure to file the quarterly returns. *See* Government Exhibit T26A (Tab 11) at 7, 9. In response, Cleveland took the lead in devising a plan to avoid paying the penalties. While the defense claims that Cleveland was merely "brainstorming" *legal* solutions to the penalties problem, the jury could have reasonably concluded otherwise. An April 10, 1995 "brainstorming session" included the following remarks:

> Joe Morgan: What about the penalties? They get pretty damn steep after a while. (Laughs)
>
> Carl Cleveland: Well, are they . . .
>
> Joe Morgan: We're paying the taxes.
>
> Carl Cleveland: What's that?
>
> Joe Morgan: We're paying the taxes because we haven't filed estimates, it's gonna be hell. You know where . . .
>
> Carl Cleveland: Well, we need to take a look at that, because if we, if we put the income on other returns, uh, there wouldn't be any penalties.

Government Exhibit T26A (Tab 11) at 7.

There would be nothing improper with putting Truck Stop Gaming, Ltd.'s income on other returns if the "income" actually belonged to some other person or entity. However, the course of the brainstorming session could have reasonably led the jury to conclude that Cleveland was looking for *any* place to put the income,

regardless of whether or not it was legitimate. For example, in the April 10, 1995 brainstorming session quoted above, Cleveland concluded that "[a]ll we gotta do is decide by the fifteenth what entity we want to report the income in." *Id.* at 10. The most "tantalizing" option, Cleveland concluded, was to put the income into F.H.G. Corporation, a company owned by Fred Goodson that was in bankruptcy at the time. *See id.* at 13-15. There is no discussion as to whether or not F.H.G. had any legitimate claim to the approximately $1.3 million. Cleveland's strong, positive reaction to the suggestion that the penalties problem be resolved by putting the money into F.H.G. Corporation, where there may have been losses to offset it, could have convinced the jury that he did not care whether or not the entity to which the income was to be "shifted" had a legitimate claim to it. Further, when Cleveland learned that one of the attorneys in his office had contacted the national accounting firm which had filed the final return for F.H.G.'s bankruptcy trustee, only to be told that it would be illegal to do what Cleveland proposed, he responded "I hate those guys, I'm gonna strangle Judy for even calling 'em cause they don't give you the right answers." Government Exhibit T28 (Tab 17) at 5; *see also* Government Exhibit J27A (Tab 16) at 1-3.

The ultimate solution to the problem, arrived at after much discussion between Cleveland, Fred Goodson, and Morgan, and consultation with members of Cleveland's law firm, was to shift the income from Truck Stop Gaming, Ltd. to both the Cleveland law firm and Fred Goodson's management company, SMFM Management

Corporation. Cleveland described the plan to Fred Goodson in an April 11, 1995 telephone conversation as follows:

> Carl Cleveland: I think what we need to do is that we need to take an amount that is roughly equal to the prof [sic] the taxable income for the year and to cut two checks, back dating them to the last day of 1994. Um, to either to you individually or to your management company for management services from the inception of the business.
>
> Fred Goodson: SMFM Managment?
>
> Carl Cleveland: Yeah. I just want it to go where you get complete control of the funds and we will treat it as a deduction ah in 1994 to the partnership to Truck Stop Gaming as income to you for 1995 and then to take roughly the other half of the income and pay it to this firm as an attorney's fee deductible in 1994 and then what we'll do is land the money back, will save enough to pay the taxes and since we don't we will be reporting it on our 95 returns we won't have the penalties problem that would otherwise exist.

Government Exhibit T28 (Tab 17) at 2-3.

The jury could have concluded that Cleveland was aware that this plan was not legal when considering Cleveland's recognition that the plan "may make Joe [*i.e.*, accountant Joe Morgan] nervous" and his statement that "if it makes Joe nervous I'll sign the tax return instead of him signing it." *Id.* at 4.

The jury could also have concluded that the legal and management fees, which the defendants claimed had been legitimately accrued over a period of approximately

four years, were not legitimately deductible. For example, the Truck Stop Gaming, Ltd. partnership agreement required Truck Stop Gaming, Ltd. to maintain its books by using the cash method of accounting, which would have required it to credit its balance sheet with income or losses only when that income or loss was actually or constructively received.[12] *See* Government Exhibit 2A, Agreement of Partnership of Truck Stop Gaming, Ltd. at § XII, page 8 ("The books of account shall be maintained on a cash basis in accordance with generally accepted accounting principles, consistently applied, and shall show all items of income and expenses."). As it is undisputed that Truck Stop Gaming, Ltd. did not receive a bill for the management fees until 1995, there could be no legitimate deduction for 1994 under the cash method of accounting.

Moreover, even if the jury found that the accrual method of accounting was the appropriate method for Truck Stop Gaming's tax returns, there was still sufficient

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[12] The cash method requires businesses to credit transactions to their balance sheet as income is actually or constructively received by them. *See* 26 U.S.C. § 451(a) (1997); *Arnwine v. Commissioner of Internal Revenue*, 696 F.2d 1102, 1111 (5th Cir. 1983). Under the accrual method, taxpayers incur expenses at the time they are billed. *See West Texas Marketing Corporation v. United States*, 54 F.3d 1194, 1196 (5th Cir.), *cert. denied*, ___ U.S. ___, 116 S. Ct. 523, 133 L. Ed. 2d 430 (1995). Federal law provides that taxable income is computed, and deductions are taken, under the accounting method that the taxpayer normally uses for his books. *See* 26 U.S.C. §§ 446(a), 461(a) (1997). The record reflects that Truck Stop Gaming, Ltd. was to use the cash method of accounting in its books. *See* Government Exhibit 2A at § XII, page 8.

evidence for them to have concluded that the legal fees charged were not legitimate deductions for Truck Stop Gaming. The legal fee deduction was purported to be for legal services rendered to Truck Stop Gaming, Ltd. during the four-year period 1991-1994. However, a January 18, 1994 letter from Judy Schott of Cleveland's firm to Fred Goodson concerning legal fees owed to the firm as of December 1993 represented that, for "truck stop matters," "all of [the law firm's] fees will be waived" from the inception of the accounts, except for a single $15,767 fee. *See* Government Exhibit 32F at 2. The value of the waived fees was $99,994. *Id.* The jury could have concluded that the firm's fees over the past several years, had, in large part, been waived and that Cleveland's idea to bill Truck Stop Gaming in 1995 for the fees and deduct them from Truck Stop Gaming's 1994 income was therefore illegitimate.

That conclusion also finds reasonable support in an August 2, 1995 conversation between Fred Goodson and Carl Cleveland, in which Goodson complains to Cleveland that he just received an $18,000 legal bill from Ollie Pierson for Truck Stop Gaming, Ltd. Cleveland's response suggests that the Cleveland firm had all along been contributing its legal services to Truck Stop Gaming for a share of the deal, rather than billing Truck Stop Gaming, Ltd. for the services rendered.

> Fred Goodson: The other thing is I've got an eighteen thousand dollar bill from OLLIE this morning.
>
> Carl Cleveland: I saw that.
>
> Fred Goodson: And I don't know how to handle that. I mean, is that my respons [sic] . . .

> ultimately, it's my responsibility. Is that TRUCK STOP GAMING's responsibility or is that my responsibility?
>
> Carl Cleveland: No, no, it's not your individually. It's TRUCK STOP GAMING and I just want you to hold it for the moment while . . . I talk to OLLIE. . . .
>
> * * *
>
> Carl Cleveland: Okay. I'm going to talk with OLLIE about her bill and . . . this is what it's goin' to boil down to. I think that if, if OLLIE is going to acquire an interest in the thing [*i.e.*, Truck Stop Gaming, Ltd.], then *she ought to be doing what we do and that is contributing the services as part of the deal.* Ah, if she's not going to acquire an interest, then we're going to pay her.

Government Exhibit T32G (Tab 82) at 1-3 (emphasis added). The jury could have reasonably concluded from Cleveland's remarks that the bill to Truck Stop Gaming for legal fees was a sham because he had agreed with Goodson to give his legal services as a contribution to Truck Stop Gaming, Ltd. for a share in the deal. *See also* Government Ex. 115 (August 24, 1994 memo in which Cleveland states "my unbillable time includes work for Tempico and Truck Stop Gaming.").

The jury also could have rejected the contention that the management and legal fees were legitimate based upon the defendants' failure to take them into account in financial data provided to banks on behalf of Truck Stop Gaming, Ltd. On April 29, 1995, after Truck Stop Gaming, Ltd. was billed for the management and legal fees, Carl Cleveland wrote a letter to Terrell Adams, President and

CEO of Community State Bank, in which Cleveland provided a Statement of Operations for the twelve months ending December 31, 1994, which did not reflect the legal and management expenses claimed on the Truck Stop Gaming, Ltd. tax return. *See* Government Exhibit 108.

The jury also could have concluded that the management fees were not legitimate expenses because the defendants adjusted the bill for the fees based solely on the amount of net taxable income that would otherwise be left after other deductions. The initial bill for the management services, which was created in Carl Cleveland's law offices, was for $713,800. However, after additional deductions were calculated, which reduced the amount of net taxable income for Truck Stop Gaming, Ltd., the management fee was adjusted accordingly on the tax return. The jury could have found that such an adjustment confirmed the sham nature of the transactions involved here.

Moreover, the jury could have found that the manner in which the transaction was done was suggestive of consciousness of guilt. Rhonda Reis, Cleveland's personal secretary, testified that, in April, 1995, at Cleveland's direction, she prepared bills to Truck Stop Gaming from the Cleveland law firm and SMFM Management and backdated them to December, 1994. She further testified that, at Cleveland's direction, she whited out the hours on billing information for Truck Stop Gaming, Ltd. *See* Testimony of Rhonda Reis. Other billing records obtained during the search of the Cleveland law firm and the O'Aces Video Poker Lounge contradicted the amount of the legal bill prepared by Reis at Cleveland' direction. *See* Government Exhibits 32B, 32E, and 32G.

Furthermore, Reis also testified that the bill from the law firm to Truck Stop Gaming, Ltd. was originally prepared on stationery that had the letterhead "Cleveland, Barrios, Kingsdorf & Casteix, L.L.P." Although the law firm was a limited liability partnership in April 1995, it had not been one in December, 1994. Reis testified that one of Cleveland's partners instructed her to change the letterhead on the bill. This was done and the letter was signed by Cleveland. There was also testimony that Fred Goodson had to have the payee on the check changed to remove the "L.L.P." from the law firm's name, making it appear that the law firm received the check in 1994, instead of 1995. *See* Government Exhibit T36D (Tab 28). The jury could have concluded that the backdating of these documents illustrated an intent to deceive the Government. *See United States v. Bourgeois*, 950 F.2d 980, 983 (5th Cir. 1992); *United States v. Lamp*, 779 F.2d 1088, 1092 (5th Cir. 1986), *cert. denied*, 476 U.S. 1144, 106 S. Ct. 2255, 90 L. Ed. 2d 700 (1986), *cert. denied*, 477 U.S. 908, 106 S. Ct. 3283, 91 L. Ed. 2d 572 (1986).

It is irrelevant that the Government may not have actually been deceived or deprived of any penalties in the end. The essence of the crime of conspiracy is the illegal agreement to defraud, and a conspiracy to commit fraud can occur even if the fraud itself is unsuccessful. *See United States v. Schneider*, 930 F.2d 555, 559 (7th Cir. 1991).

The jury was also free to reject the testimony of the defendants' tax experts, William Sykes and Richard Kelley. Sykes and Kelley both testified that the transactions involved were legitimate. However, it is well settled there "[q]uestions of credibility and the weight of expert testimony are for the jury." *United States v. Collins*, 491 F.2d

1050, 1052 (5th Cir. 1974). The jury was free to reject their testimony altogether.

In short, the Court finds that, in light of the above cited evidence, there was sufficient evidence to support the conclusion that Cleveland entered into an agreement to defraud the United States with at least one other person. As the defendants recognize, acquittal of Fred Goodson (and all other co-defendants charged) on these charges, does not mandate the granting of a judgment of acquittal in this case. *United States v. Zuniga-Salinas*, 952 F.2d 876, 877-78 (5th Cir. 1992) (*en banc*) (acquittal of all other conspirators does not mandate judgment of acquittal of remaining conspirator). Because the jury may have been motivated by mistake, compromise, or lenity in acquitting Cleveland's co-defendants on this count, the Court cannot conclude simply from their acquittals that there is insufficient evidence to find a conspiracy. Rather, the Court must independently assess sufficiency of the evidence, which it has done here, *Id.; see also, United States v. Powell*, 469 U.S. at 64-65, 105 S.Ct. 471, 475 (1984).

In any event, the jury could have reasonably concluded that Cleveland conspired with someone who was not a defendant in this case. Tape recorded conversations, documents and the testimony of both Carl Cleveland and his secretary, Rhonda Reis, reveal that other persons in the law firm were involved in these transactions. For example, evidence that one of Cleveland's partners made sure that the letterhead of the law firm's bill was changed to remove the "L.L.P." designation so as to prevent detection that the document was backdated was sufficient involvement upon which to base a finding of conspiracy. *See also* Government Exhibit 32F (firm's letter regarding

fee waiver); Government Exhibit 115 (Cleveland memo to partners that his Truck Stop Gaming work was "unbillable time"). To find the existence of a conspiracy, a specific agreement need not always be shown; agreement may be inferred from concern of action. *See Frydenlund*, 990 F.2d at 825.

Cleveland's motion for a judgment of acquittal as to Count 13 must therefore be denied.

d. Aiding and Abetting the Filing of a False Tax Return (Cleveland — Count 15)

Defendant Cleveland challenges his conviction on Count 15 for aiding and abetting the filing of a false statement on a tax return in violation of 26 U.S.C. § 7206(2). "In order to establish a violation of § 7206(2), the government is required to prove: (1) that [the defendant] aided, assisted, procured, counseled, advised or caused the preparation and presentation of a return, (2) that the return was fraudulent or false as to a material matter, and (3) that the act of the [defendant] was willful." *United States v. Klausner*, 80 F.3d 55, 59 (2d Cir. 1996). It is not necessary that a defendant sign or actually prepare a tax return to be found guilty of willfully aiding and abetting in the preparation of false returns. *United States v. Brian*, 896 F.2d 68, 74 (5th Cir.), *cert. denied*, 498 U.S. 847, 111 S. Ct. 133, 112 L. Ed. 2d 101 (1990), *cert. denied*, 498 U.S. 824, 111 S. Ct. 76, 112 L. Ed. 2d 49 (1990).

The discussion of the evidence as set forth above shows that it was reasonable for the jury to have

concluded that the Government met its burden in proving Count 15 against defendant Cleveland. That Cleveland willfully aided, assisted, counseled, and/or advised in the preparation of the tax return in question is clear from the evidence. The return in question, a 1994 United States Partnership Return of Income (Form 1065) for Truck Stop Gaming, Ltd. for the calendar year 1994, reported deductions in the form of legal fees and management fees purportedly owed by Truck Stop Gaming to Cleveland's law firm and SMFM Management. As described above, it was Cleveland's idea to report such deductions. *See, e.g.*, Government Exhibit T28 (Tab 17) at 2-3 (Cleveland suggesting back dating bills for management services and legal fees to avoid paying tax penalties).

The jury could have reasonably found that the representations as to these deductions for legal fees and management fees were materially false. A tax return that represented that Truck Stop Gaming, Ltd. had a negative income as opposed to a $1.3 million income could clearly be found to be materially false. Under the law, the deductions constitute material matters "if they were essential to the accurate computation of the clients' taxes." *Klausner*, 80 F.3d at 55. *See also, United States v. Damon*, 676 F.2d 1060, 1064 (5th Cir. 1982) ("claiming business loss deductions to which the taxpayers were admittedly not entitled, rendered the returns "fraudulent" or "false as to a material matter. . . . "); *United States v. Knapp*, 25 F.3d 451, 457 (7th Cir. 1994) (false claim to deductions); *United States v. Warden*, 545 F.2d 32, 37 (7th Cir. 1976) ("The test of materiality with respect to a false return case is whether a particular item must be recorded in order that the taxpayer estimate and compute his tax correctly."); *United*

States v. Null, 415 F.2d 1178, 1181 (4th Cir. 1969) (same). While partnerships do not pay taxes, the representations as to the legal and management fees deductions certainly affected the accuracy of the individual returns of the relevant parties. *See generally United States v. Mittelstaedt*, 31 F.3d 1208, 1221 (2d Cir. 1994) (holding defendant's failure to disclose another partner's interest in a partnership tax return was material because it had potential for hindering IRS's efforts to verify and monitor the other partner's tax liability). Moreover, courts have generally found that representations designed to misstate the amount of taxable income of a person or entity are material regardless of the amount. *See United States v. Aramony*, 88 F.3d 1369, 1385 (4th Cir. 1996); *United States v. Holland*, 880 F.2d 1091, 1096 (9th Cir. 1989) (stating that "any failure to report income is material"); *United States v. Young*, 804 F.2d 116, 119 (8th Cir. 1986), *cert. denied*, 482 U.S. 913, 107 S. Ct. 3184, 96 L. Ed. 2d 673 (1987) (concluding that the omission of information necessary to compute income is material); *United States v. Hedman*, 630 F.2d 1184, 1196 (7th Cir. 1980), *cert. denied*, 450 U.S. 965, 101 S. Ct. 1481, 67 L. Ed. 2d 614 (1981) (stating that "false statements relating to gross income, irrespective of the amount, constitute a material misstatement in violation of Section 7206(1)"). The jury therefore could have concluded that the statements were material.

As detailed above, there was also sufficient evidence for the jury to have found that Cleveland willfully made the statements, knowing they were false. *See e.g.*, Government Exhibit T28 (Tab 17) at 4 (Cleveland recognizing

that the plan to make the deductions for legal and management fees "may make [accountant Joe Morgan] nervous" and expressing a willingness to sign the return if Morgan refused to do so). As the Court finds that a reasonable jury could have found that the Government proved each of the elements of a violation of Section 7206(2) beyond a reasonable doubt, Cleveland's motion for judgment of acquittal as to Count 15 must be denied.

e. Interstate Communications in Aid of Racketeering (Fred Goodson — Counts 16-18)

Defendant Goodson was convicted of three separate counts of interstate communications in aid of racketeering (Counts 16-18). The underlying "specified unlawful activity" charged in each of these counts was public bribery in violation of Louisiana law. In his motion for judgment of acquittal, Goodson challenges each count solely on the grounds that the Government failed to show beyond a reasonable doubt that he offered any bribes. The Court has already addressed the sufficiency of the evidence against Larry Bankston as to his convictions on Counts 17 and 18 and has concluded that there was sufficient evidence for the jury to have concluded that Bankston directly or indirectly accepted or offered to accept a bribe in the form of a sham condominium rental. The Court finds that a reasonable jury could have concluded that Goodson offered Bankston that bribe based on the same evidence described above. Accordingly, Goodson's challenge to those convictions must be rejected. The Court therefore turns to Goodson's conviction as to Count 16.

Count 16 charged Fred Goodson with a violation of the Travel Act, 18 U.S.C. § 1952, as a result of aiding and abetting a May 23, 1995 interstate telephone communication between Maria Goodson in Slidell, Louisiana, and Joe Morgan in Laurel, Mississippi, regarding BAJ, LLC. As noted above, the essential elements of the Travel Act, 18 U.S.C. § 1952 (1997), are:

> (1) travel or use of the mail or any facility in interstate or foreign commerce;
>
> (2) with the specific intent to promote, manage, establish, or carry on — or distribute the proceeds of — unlawful activity; and
>
> (3) knowing and willful commission of an act in furtherance of that intent subsequent to the act of travel or use of the mail or facility in interstate or foreign commerce.

See, e.g., Logan, 949 F.2d at 1380-81; *Hernandez-Palacios*, 838 F.2d at 1350; *Carrion*, 809 F.2d at 1127; *Cauble*, 706 F.2d at 1351. Because Goodson was charged with aiding and abetting the telephone call pursuant to 18 U.S.C. § 2, he can be found guilty without actually having made the interstate telephone call in question. *See Holcomb*, 797 F.2d at 1328.

Goodson challenges his conviction as to Count 16 solely on the grounds that no reasonable jury could have concluded that the Government showed that the BAJ transaction was offered to former Louisiana State Senator B.B. Sixty Rayburn as a bribe. The Court disagrees. While the Court is mindful that Rayburn was acquitted of all charges, a finding that Goodson *offered* BAJ as a bribe does not require a finding that former Senator Rayburn *accepted* it as a bribe.

In a recorded December 28, 1994 conversation between Fred Goodson and Larry Bankston, Goodson explained to Bankston that he had given an interest in Truck Stop Gaming, Ltd. to B.B. Sixty Rayburn's children at Rayburn's request that he do something for them. Government Exhibit T18 (Tab 1) at 14. Goodson specifically said that he wanted the deal to be with B.B. Sixty Rayburn directly, but that Rayburn wanted the deal to be done with his adult children. *Id.* at 13 ("I felt more at ease if he'd have done it for himself and we could have handled that. We'd have done everything for him. But he wanted it for his kids . . . "). In this same conversation, Goodson said that based on his conversations with Tommy Jean Rayburn, Rayburn's daughter, he felt that he could count on Rayburn's vote. *Id.* at 15. The jury could have concluded from these conversations that the transfer of 4.99% of Truck Stop Gaming, Ltd. to the Rayburn children was intended to be a bribe to Senator Rayburn in exchange for his vote.

Moreover, the documentary evidence in the case showed that the "sale" of the 4.99% partnership interest was on terms so favorable to the Rayburns that the jury could have found that it was intended to be a disguised bribe. *See* La. R.S. 14:118 (1997) Reporter's Comments ("The bribe need not be direct; it may be hidden under the semblance of a sale, wager, payment of debt, or in any manner designed to cover the true intentions of the parties."). The partnership interest, which brought the Rayburn children approximately $6,000 each month, was "purchased" without any money down, without any collateral except the interest itself, and without any real risk on the part of the Rayburn children. To pay for the 4.99%

interest, Bennie Rayburn signed a $25,000 promissory note on which there was no recourse to him personally since it was payable on an *in rem* basis out of the proceeds of the partnership interest (*i.e.*, it would only be paid out of the profits made on the deal). *See* Government Exhibit 15. The testimony at trial revealed that, even though the Rayburn children had already received twice the amount of the note, approximately $50,000, in payments from Truck Stop Gaming, Ltd., the company made no demand for repayment of the note, and no payments were made on it. *See* Testimony of Bennie Rayburn, Tommie Jean Rayburn, and Elizabeth Ann Bedwell. Finally, the testimony showed that the Rayburns ultimately performed no real services to Truck Stop Gaming, Ltd. in exchange for this partnership interest. *Id.* The jury could have reasonably concluded, based on the December 28, 1994 conversation and the terms of the transaction, that when Goodson transferred 4.99% of a highly lucrative, closely-held business to Bennie Rayburn and his sisters at the Senator's request, he intended the transaction to be a bribe.

It is undisputed that the phone call between Maria Goodson and Joe Morgan that is the basis for Count 16 was about accounting for the payments made by Truck Stop Gaming, Ltd. to BAJ, LLC. *See* Government Exhibit T44A (Tab 38) at 5. It is further undisputed that Goodson later asked Rayburn for help regarding his state arrest and the closure of the O'Aces Video Poker Lounge — an act that clearly could have satisfied the overt act requirement. Goodson and Bankston described the encounter in a July 7, 1995 conversation as follows:

Fred Goodson: I called Sixty back today. Well, went to see him last night. And I said you know, we need some help, we need to suppress this, cause this could be extremely embarrassing to a lot of people. It could point to him, too. . . .

Larry Bankston: Well, since he has a stake specifically in that deal, Sixty ought to have his ass in gear.

Fred Goodson: Um hum, in gear.

Larry Bankston: Um, because, I mean, you lose your license, he loses his deal.

Fred Goodson: Big time.

Government Exhibit T53A (Tab 64) at 14-15.

The jury could have found that Goodson's request for Rayburn's political pull in getting him out of the situation was an overt act in furtherance of the intended bribe.

As the Court finds that a reasonable jury could have found that all three elements of a Travel Act violation were proven beyond a reasonable doubt as to Count 16, Fred Goodson's motion for judgment of acquittal as to Count 16 must be denied.

f. RICO and RICO Conspiracy (Fred Goodson and Cleveland — Counts 1 and 2)

Goodson and Cleveland move for a judgment of acquittal as to each of their convictions of racketeering (Count 1) and racketeering conspiracy (Count 2) on the sole grounds that there was insufficient evidence to find that two predicate acts had been committed. As the Court

has found sufficient evidence as to all of the defendants' convictions, the Court rejects the defendants' motion as to these counts. In any event, the Court finds that the evidence, when viewed in the light most favorable to the Government, was sufficient to convict the defendants of both racketeering and racketeering conspiracy. The jury could have found that the defendants both conspired to form and formed an enterprise consisting of themselves; Truck Stop Gaming, Ltd.; Truck Stop Gaming, Inc.; and the O'Aces Video Poker Lounge designed to promote video poker establishments at truck stops throughout the State of Louisiana and that in conducting the affairs of the enterprise, the defendants participated in a pattern of racketeering activity consisting of each of the substantive convictions described above. Accordingly, the defendants' motion for judgment of acquittal as to Counts 1 and 2 must be denied.

B. Motions for a New Trial

Each of the convicted defendants has alternatively moved for a new trial pursuant to Fed. R. Crim. P. 33. Rule 33 provides that "[t]he court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice." Fed. R. Crim. P. 33 (1997). As each of the convicted defendants has adopted the arguments for a new trial presented by the others, the Court will address all of their arguments together. For the reasons that follow, the motion for a new trial is denied.

1. Prosecutorial Misconduct in Closing Arguments

Each of the convicted defendants moves for a new trial on the grounds that Assistant United States Attorney Michael Magner made a number of improper statements in the Government's rebuttal closing arguments. Specifically, the defendants charge that the prosecutor improperly accused both the defendants and defense counsel of being "arrogant liars" and "thieves"; improperly characterized evidence about Darryl Hunt as "a classic Louisiana shakedown," inviting improper use of that evidence; improperly slandered defense witness Bret Sulzer by accusing him of lying and corruption; improperly appealed to prejudices the jury might have against public officials; and in the closing remarks to the case, improperly invited the jury to decide the case not on the evidence, but on its general feelings about Louisiana politics. The Court agrees with the defendants that some of the prosecutor's remarks were improper, but holds that, when considered in context, the prosecutor's remarks were not so egregious as to mandate a new trial.

If the defendants did not object to the prosecutor's remarks when made, then the Court reviews the remarks under the plain error standard — that is for error which is "obvious, substantial, and so basic and prejudicial that the resulting trial lacks the fundamental elements of justice." *United States v. Casel*, 995 F.2d 1299, 1308 (5th Cir. 1993), *cert. denied*, ___ U.S. ___ 114 S. Ct. 1308, 127 L. Ed. 2d 659 (1994) (quoting *United States v. Valdiosera-Godinez*, 932 F.2d 1093, 1097 (5th Cir. 1991) (quoting *United States v. Birdsell*, 775 F.2d 645, 653 (5th Cir. 1985), *cert. denied*, 476

U.S. 1119, 106 S. Ct. 1979, 90 L. Ed. 2d 662 (1986))). If, however, the defendant did object to the prosecutor's remarks when they were made, then there are three factors courts use to determine whether or not improper argument "affected the substantial rights of the defendant" so as to mandate a new trial: "(1) the magnitude of the prejudicial effect of the statements, (2) the efficacy of any cautionary instructions, and (3) the strength of the evidence of the defendant's guilt." *United States v. Saenz*, 747 F.2d 930, 942 (5th Cir. 1984), *cert. denied sub nom, Solis v. United States*, 473 U.S. 906, 105 S. Ct. 3531, 87 L. Ed. 2d 655 (1985); *see also United States v. Palmer*, 37 F.3d 1080, 1085 (5th Cir. 1994), *cert. denied*, 514 U.S. 1087, 115 S. Ct. 1804, 131 L. Ed. 2d 730 (1995); *United States v. Casel*, 995 F.2d 1299, 1308 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1308, 127 L. Ed. 2d 659 (1994). "The magnitude of the prejudicial effect is tested in part by looking at the prosecutor's remarks in the context of the trial in which they are made and attempting to elucidate their intended effect." *Palmer*, 37 F.3d at 1085; *Casel*, 995 F.2d at 1308.

First, the Court notes that the defendants failed to object at trial to any of the statements in question with the single exception of the prosecutor's closing remarks in the case concerning Louisiana politics. Applying the standard described above to each of the cited instances of misconduct, the Court finds that a new trial is not warranted.

a. Accusations of Defense Counsel and/or Defendants Lying or Being Thieves

The defendants each claim that the prosecutor attacked the credibility of defense counsel in such a way as to endanger the defendants' Sixth Amendment rights. For example, the defendants note that the prosecutor's remark, at the beginning of his rebuttal, that "It's just mind-boggling to me how intelligent people can get up here in front of an equally intelligent group of people and lie, and not just lie, but just tell big, giant, whopper lies." Government's Memorandum in Opposition to Bankston's Motion for New Trial, Exhibit A, Transcript of Prosecution's Rebuttal Argument ("Magner Transcript") at 32. The defendants maintain that this remark was clearly directed at defense counsel, and not at the defendants. However, when considered in context, it is clear that the prosecutor's remarks were directed at the defendants. Immediately preceding the above-quoted excerpt, the prosecutor remarked, "You have seen Olympic-style arrogance. You've heard it. *You've heard it coming from the voice of all of these defendants, from the tapes that we played here.*" *Id.* (emphasis added).

The same is true of other remarks that the defendants argue challenge the veracity of defense counsel. For example, the defendants maintain that counsel for defendant Bankston made a statement in his closing argument about the defense lawyers, defendants, and jurors "holding hands in the dark" and that the prosecutor responded in rebuttal by saying, "If you're holding hands with this bunch in the dark, you better check your wallets, folks." *Id.* at 36. In fact, the trial transcript makes it clear that

counsel for Bankston's remarks referred solely to the defendants "holding hands in the dark, counting on the sunlight of the law and the rules of evidence to open up for us and open up for you to vote everybody not guilty." Transcript, Closing Argument of Lewis Unglesby ("Unglesby Transcript") at 28-29. The statements leading up to Mr. Unglesby's remarks — which constitute a description of all of the defendants in the case — make this clear:

> We have got an 81-year-old man in here, a 26-year-old kid, a businessman. . . . We have a lawyer trying his best to help his client. . . . We have my client, a young man who managed, as Edwin Edwards said, to be one of these remarkable people that gets along with everybody because he has nothing but positive and good qualities, dragged in through misunderstanding and misperceptions of what the legislative process was all about. Sure, we are friends now. We've been through a process and experience that we would never wish on our worst enemy, but we are not lawyers anymore or Senators, dads, businessmen. We are just a bunch of folks holding hands in the dark, counting on the sunlight of the law and the rules of evidence to open up for us and open up for you to vote everybody not-guilty.

Unglesby Transcript at 28-29.

There is no doubt from the context of Mr. Unglesby's remarks that he referred to the *defendants* and not the defense counsel as "holding hands in the dark." Once again, therefore, the prosecutor's remarks about the comment were directed at the defendants and not at defense counsel.

In short, the Court finds that the accusations of lying by the prosecutor were directed almost exclusively at the defendants, and not defense counsel, as the defendants claim. It is true that the Government's arguments concerning the falsity of the defendants' testimony and the lack of credibility of some of the defense's assertions were not worded in the politest of terms but the language used was not significantly different from that employed in *United States v. Siegel*, 587 F.2d 721, 726 (5th Cir. 1979). In *Siegel*, the Court found that there was no prejudice from the following exchange:

> Prosecutor: . . . Now, just because a man says that, that doesn't make it true, and in this case he lied. He lied because
>
> Defense Counsel: [Objection and motion for mistrial]
>
> Prosecutor: I am telling you now, it is not my opinion. This tells us so, Government Exhibit 18 (indicating), it tells us that [the defendant] lied when he took the stand. Government Exhibit Number 17 tells us [the defendant] lied when he was on the witness stand. Government Exhibit Number 16 tells us that [the defendant] lied when he took the stand. . . .

Siegel, 587 F.2d at 726 n. 5.

In *Siegel*, the Court concluded that the prosecutor's statements concerning "lies" and "liars" were "merely intended to argue that [the defendant's] statements were not supported by the evidence." *Id.* at 727. As in *Siegel*, there was no suggestion here that the prosecutor's remarks were based on some personal knowledge unknown to the jury, rather than on the evidence. In light

of that, the remarks were not improper. *See United States v. Washington*, 44 F.3d 1271, 1278-79 (5th Circuit 1995); *United States v. Loney*, 959 F.2d 1332, 1343 (5th Cir. 1992) (reference to defendant as "a liar" not impermissible if based on evidence that defendant's statements and actions were not consistent). The Court finds that all of the prosecutor's arguments about "lies" were good faith arguments based on the evidence adduced at trial and were, at best, borderline improper.

In any event, the Court finds that even if these statements were improper, they clearly did not rise to the level of warranting a new trial. In making this determination, the Court first looks at the prejudicial effect of the statements on the jury. That the jury was not inflamed is demonstrated by the fact that defendants Rayburn and Morgan were acquitted on all charges and all defendants were acquitted of some of the charges against them. *See Saenz*, 747 F.2d at 942. "This indicates . . . that the jury carefully weighed the evidence against each defendant, acquitted when the evidence was insufficient. This reflects a logical approach to the deliberations, inconsistent with passion or prejudice." *Id.* at 943.

That the jury was not inflamed is further supported by the Court's repeated cautionary instructions to the jury that the arguments of counsel were not evidence. On several occasions, this Court instructed the jury that "any statements, objections, or arguments made by the lawyers are not evidence in the case." *E.g.*, Transcript of Court's Instructions to the Jury at 3-4. The Fifth Circuit has held that such an instruction is sufficient to protect a defendant's rights and insure that the jurors place the lawyers' arguments in proper perspective. *See, e.g., Saenz*, 747 F.2d

at 943 (repeated instructions that arguments of counsel are not evidence sufficient to protect defendants against prejudice). Finally, as shown by the Court's lengthy discussion, *supra*, the Court finds that the evidence sufficiently supported each conviction.

b. Argument Concerning Darryl Hunt

Counsel for Bankston maintains that the prosecutor's description of a secretly recorded conversation between Bankston and lobbyist Darryl Hunt, in which Bankston suggests to Hunt that he should rent Bankston's condominium, pay Bankston for the rental, and "just don't go", as a "classic Louisiana shakedown" was an invitation for the jury to make improper use of that evidence. The Court disagrees. The statement was introduced as F.R.E. 404(b) evidence related to Bankston's alleged "sham rental" of his condominium to Fred Goodson under similar circumstances. The record reflects that the prosecutor's argument about the condominium was made in response to arguments made by counsel for Bankston in his opening statement, which had no evidentiary support in the record. Specifically, Bankston's counsel made the following arguments in his opening statement regarding the condominium rental:

> . . . Florida. This is supposed to be it, $1,100 or whatever, in July. Florida is simple. Larry and his wife own a condominium. All right. They rent it and they use it. There's periods of time — they have six children. They have a "his, mine and ours" kind of family. There's periods of time when they have reserved it for their children to use. It happens that during the course of

> the end of the session in 1995 the kids can't go. They have other activities, you know children, and the older children can't go and Goodson knows about it. He is tired. Maria is tired. Maria has been working and working. She's on the tapes complaining about how she never gets a day off. His wife is going to out of town to Greece. Goodson decides he will rent the condo, surprise his family and go. Larry doesn't care. There's plenty of room. He's going anyway. Goodson has some problems in his business during the course of the week and he never goes.

Transcript Bankston Opening Statement at 27.

"[T]he prosecution is entitled to make a fair response in rebuttal to the argument of defense counsel." *United States v. Vaccaro*, 115 F.3d 1211, 1217 (5th Cir. 1997); *United States v. Williams*, 822 F.2d 512, 518 (5th Cir. 1987). This is so especially if the argument has foundation in the record. *Vaccaro*, 115 F.3d at 1216. The evidence concerning the condominium rental to Goodson that was adduced at trial is detailed above, including the 404(b) evidence concerning Darryl Hunt. The Court finds that based on the facts of Bankston's exchange with Hunt, Mr. Magner's argument was not unreasonable or improper. Likewise, it was reasonable for counsel for Bankston to argue in his closing, as he did, that the Government "tr[ied] to make something" out of "a simple exchange" that was "not even charged in this case." Unglesby Transcript at 24. In any event, the Court finds that there was not sufficient prejudice to Bankston, even if the prosecutor's remark

was improper, considering the Court's cautionary instructions regarding lawyer argument and the evidence against Bankston as to his convictions.

c. Alleged "Slander" of Brett Sulzer

Counsel for Bankston charges that the prosecutor's remarks concerning the biases of defense witness, Brett Sulzer, were improper. Specifically, counsel for Bankston objects to the following remarks made after reference to Frank Blackburn as "the lawyer who represents all the video poker interests":

> Where does Brett Sulzer work now? You heard the man who initiated the State Police case against Fred Goodson for lying about the bankruptcy, for lying about the fuel sales report, for failing to report that he sold the truck stop. That's where he's working. He sold out. That's the truth of the matter. You saw it. You are watching corruption in process, and it is not a pretty sight.

Magner Transcript at 55.

The Court finds that the Government's argument as to Mr. Sulzer's bias was not improper, except as to the last sentence. Mr. Sulzer, a former attorney for the State Police who initiated the arrest of Fred Goodson on July 5, 1995 on state charges relating to approximately 100 counts of false statements made to the Louisiana State Police on Goodson's video poker site license application, testified that he was now making a lot more money working for a lawyer, Frank Blackburn, who regularly represented video poker interests. *See* Testimony of Brett

Sulzer. There was evidence admitted at trial that showed that Frank Blackburn had a significant financial interest in defending against State Police enforcement actions. *See* Government Exhibit T53A (Tab 64) at 19 (Bankston telling Blackburn that the State Police were "f---ing up" and noting that Blackburn was "just making money off of them" and was probably "glad for them to keep f---ing up") (ellipses by the Court).

Even though Sulzer had been directly involved as the attorney who initiated Fred Goodson's state court prosecution for the State Police, Sulzer criticized and was dismissive of many of the same State Police documents and legal principles on which he based his actions in 1995. The Government was certainly entitled to argue that Sulzer had a significant bias and that he had "jumped ship" or "sold out." This characterization of the evidence was proper argument about the bias of a defense witness.

As to the last sentence of the quoted argument, it was improper to suggest that Mr. Sulzer's switching sides to represent video poker interests was "corruption in progress." However, the Court finds that to the extent that the prosecutor's argument was improper, the defendants suffered no prejudice for the same reasons stated earlier (acquittal of some defendants showing no inflammatory effects, cautionary instructions, sufficiency of the evidence). Accordingly, a new trial cannot be granted on these grounds.

d.References to Louisiana and Politics

Bankston also complains that the prosecutor improperly suggested to the jury that it could decide what the facts of the case were by reference to the state of politics in Louisiana. Specifically, Bankston objects to the following remarks made by the prosecutor to the jury: "Come on, folks. You may have been born at night, but it wasn't last night. You've been around this state long enough to know what's going on here." Magner Transcript at 39.

The Court agrees with defendant Bankston that such an argument was improper — particularly the last sentence. Suggesting to the jury that they've been around Louisiana long enough to "know what's going on here" is undoubtedly a subtle appeal for the jurors to base their decision on some preconceived notion that Louisiana politics or politicians are corrupt. Such argument is improper.

However, the Court also finds that such improper argument does not warrant a new trial. As noted above, there is sufficient evidence that such comments did not have a prejudicial effect on the jury. First, the fact that former Senator Rayburn, the other Louisiana politician charged with political corruption in this case, was acquitted of all charges indicates that the jury carefully weighed the evidence against each defendant, acquitting when the evidence was insufficient. *Saenz*, 747 F.2d at 942. "This reflects a logical approach to the deliberations, inconsistent with passion or prejudice." *Id.* at 943. Second, the Court's repeated instructions that the arguments of counsel were not evidence were sufficient to protect

the defendants' rights. *Id.* Finally, the evidence sufficiently supported each conviction.

Bankston also maintains that the prosecutor improperly mocked defense counsel's arguments by referring to Bankston as "Mr. Good Government" and "Mr. Local Option." While the Court in no way condones the use of such snide remarks, the Court finds that, at best, they were borderline improper and, in any event, did not come close to constituting "plain error."[13]

e.The Closing Remarks

The most serious of the defendants' allegations of improper argument is definitely the one argument to which they did object at trial. Specifically, the prosecutor closed his rebuttal argument with a number of appeals for the jury to consider their feelings about the success of Louisiana politicians generally over the years. The closing argument in question, together with the Court's instructions, went as follows:

> Mr. Magner: Sixty Rayburn says he's been in that Legislature for 40 years. Well, in that 40 years has Louisiana changed for the better in those things where we are compared to other states? Now, we may have the great horse racing

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[13] The Court reaches the same conclusion as to several other allegedly improper statements cited in defendant Bankston's motion for a new trial but not specifically addressed in this opinion (*e.g.*, references to counsel's arguments as "garbage", engaging the jury in an "us versus them" exercise, with the "them" being legislators, and comments upon the defendant's or defense counsel's "swagger").

industry, we have a video poker industry to beat the band when they are not tied up here in federal court, but where do we stand on infant mortality? Where do we stand on the things that count? Where do we stand on the schools that your kids go to? Now, the schools are great, I guess, if you want to keep your horses there, but the Dean of the Legislature —

Mr. Unglesby: Judge, I think this is out —

The Court: I think it's out of bounds on the issue of state government.

Mr. Magner: It's ludicrous, Ladies and Gentlemen, to think that $6,000 or $7,000 a month would be going to Tommie Jean Rayburn and Bennie Rayburn for any other reason than a payback, a kickback, a bribe to Sixty Rayburn. If you want to believe that, that's your prerogative, Ladies and Gentlemen, but you won't be using your good sense. You won't be using the lessons you learned in life. You won't learn the lessons you have learned by living in Louisiana all these years. People say we can't change that, we don't want to change that, we are going to be this way forever, that we are —

Mr. Unglesby: Judge —

Mr. Magner: — all going to have this corruption —

The Court: Stick to this case, not the broader issue.

Mr. Magner: Yes.

The Court: I don't want any comments.

Mr. Magner: You can make a change here. You can make a change now.

Mr. Unglesby: We are not making any progress here. Objection.

The Court: Mr. Magner –

Mr. Magner: Judge, this is my summation. I'm going to relate it to the facts of the case.

The Court: Get to the facts of the case.

Mr. Magner: You can make a change right here, right now, in this case, under these facts and say, "No. We are not going to put up with it anymore," you are not going to put up with $800 or $900 quail hunts, you are not going to put up with his paid vacation, you are not going to put up with $50,000 or $60,000 going to his kids for no other reason than they are his kids. You can make a change. Bravery is nothing other than a series of brave acts and this is one to take.

Listen to the evidence. Take as much time as you need, as much time as you want. Listen to those tapes. Look at every piece of evidence. Look at every piece of defense evidence. If you do, you will do the right thing. You will do justice, and you know what that is. It's "guilty" on all counts on all defendants and you can start taking back your state. Thank you.

Mr. Unglesby: Objection, Your Honor. That last part was absolutely way beyond your ruling. Really.

The Court: I already ruled on the issue as to arguments about broader issues of state government than the issues that are involved in this case and that was not proper. The jury is instructed to disregard the comments about the

> public school system in Louisiana. I think they understand the scope of the instruction.

Magner Transcript at 57-60.

The Court took a recess after Mr. Magner's argument, and when the trial resumed, the Court immediately instructed the jury again to disregard Mr. Magner's improper remarks:

> THE COURT: Court is in session. Please be seated. I would like to instruct you again that this case is not about the general conditions in the state of Louisiana. To the extent that Mr. Magner made reference to that in his closing argument, you are instructed to disregard the comments about the general condition of Louisiana state government as it relates to education or other issues.

The Government maintains that these closing remarks were in direct response to improper arguments of defense counsel relating to defendant Rayburn, in particular. In Rayburn's closing argument, counsel for Rayburn repeatedly referred to Rayburn as a politician in the tradition of Huey Long and Earl Long, who had left a "legacy" as a "populist," who "always worked for the working man," — an "FDR Democrat." Specifically, counsel for Rayburn stated:

> You are not to decide this case in a voting booth. You have to decide this in a palace of justice and what's at stake here — look. Sixty Rayburn, talking about politics, he's an old time Democrat. I'm talking about an FDR Democrat, a Harry Truman Democrat, a John F. Kennedy Democrat. He's even more of a politician in the form of Huey Long and Earl Long. He has

> always believed in the little man. He has always worked for the working man to have an honest wage. The chance to go to the track, to put down $2 on the long shot and hit the jackpot, that's been Sixty Rayburn. It's his life. It's that legacy which is on trial here today, not his future life, because after all he's almost 81. It's that passed legacy which is on trial here today which I leave in your hands.

Transcript of Closing Argument of Arthur Lemann III ("Lemann Transcript") at 29. The Government maintains that its closing remarks were not a call for "a crusade for the betterment of Louisiana" but rather were an attempt to focus the jury on the charged conduct against Rayburn.

The Court finds that the arguments made by Rayburn's counsel in closing concerning his "legacy being on trial" were improper, as they focused the jury on Louisiana's political legacy and not on the individual facts of the case. However, "two wrongs [do] not make a right." *Vaccaro*, 115 F.3d at 1216 (quoting *United States v. Lowenberg*, 853 F.2d 295, 302 (5th Cir. 1988), *cert. denied*, 489 U.S. 1032, 109 S. Ct. 1170, 103 L. Ed. 2d 228 (1989)); *see also, United States v. Young*, 470 U.S. 1, 11-12, 105 S. Ct. 1038, 1044-45, 84 L. Ed. 2d 1 (1985). The prosecutor should not have continued to put Louisiana's political legacy on trial, instead of the individual defendants. While the Court may consider the "invitation" to respond in judging whether the prosecutor's "invited response" unfairly prejudiced the defendants, there are simply some "invitations" that a prosecutor must and should decline. *Vaccaro*, 115 F.3d at 1217-18.

The Court finds that the Government's closing remarks as to the general conditions in Louisiana, even if made in good faith, were improper. However, the Court finds that there was not sufficient prejudice to merit a new trial. First, the Court notes the context in which the remarks were made — namely, in direct response to improper arguments made by counsel for Rayburn. Second, the fact that the comments were directed at Rayburn — and that he was acquitted of all counts — strongly suggests that the remarks did not inflame the jury and that their decision was based on a reasoned evaluation of the evidence. *Saenz*, 747 F.2d at 942-43. Third, the Court instructed the jury to disregard the improper argument more than once. Moreover, the jury was repeatedly instructed that lawyer argument was not evidence. There is no reason to believe that the jury disregarded the Court's repeated instructions to base its verdict solely on the evidence adduced at trial. *Vaccaro*, 115 F.3d at 1218. Further, the Court notes that while counsel for defendants now claim that "no instruction from the Court could have cured the problem," the Court notes that the defendants obviously did not feel that way at the time of the incident, as they did not move for a mistrial at that time. Finally, the Court has already found that the evidence supports each of the convictions against each of the defendants. Accordingly, the motion for a new trial cannot be granted on the grounds that the prosecutor's closing remarks were improper.

f. The Absence of an Instruction To the Effect that Gifts are Legal and Are Not Bribes

Defendant Bankston argues that a new trial should be granted because there was insufficient proof regarding Bankston's intent to accept a bribe. Moreover, Bankston argues that the jury was not sufficiently instructed on the issue because it was not specifically informed that it is legal for someone who is not a registered lobbyist to give a gift to a legislator.

The Court has already rejected Bankston's claims as to the sufficiency of the evidence as to his intent regarding the bribery charge above. The Court also rejects his argument that this Court's instruction was deficient. This Court instructed the jury that "public bribery is the direct or indirect acceptance or offer to accept anything of apparent present or prospective value by a person who has been elected or appointed to public office with the specific intent to be influenced in his conduct in relation to his employment, position or duty." The Court further instructed the jury that: "In order to convict a defendant of public bribery as the receiver of a bribe, you must find . . . that the defendant under consideration either directly or indirectly accepted or offered to accept a thing of value alleged in the superseding indictment from the person giving or offering to give the thing of value *with the specific intent to be influenced in his conduct in relation to his employment, position or duty as a Louisiana state senator.*" Court's Final Instructions to the Jury at 36-42 (emphasis added). The Court even instructed the jury on the definition of specific intent. The Court informed the jury that "[s]pecific intent, as that term implies, means more than

the general intent to commit the act. To establish intent the Government must prove that the defendant knowingly did an act which the law forbids, purposefully intending to violate the law." *Id.* at 39.

Under Fifth Circuit Law, "[t]he refusal to give a jury instruction constitutes error only if the instruction (1) was substantially correct, (2) was not substantially covered in the charge delivered to the jury, and (3) concerned an important issue so that the failure to give it seriously impaired the defendant's ability to present a given defense." *United States v. Tomblin*, 46 F.3d 1369, 1378-79 (5th Cir. 1995). This court's refusal to grant the defendant's request for a specific instruction about the legality of giving a gift to a legislature was clearly not error under this standard. The Court's instructions concerning specific intent were clear, detailed, and substantially covered the charge suggested by the defendant. A juror who understood the Court's charge would necessarily know the difference between a legitimate gift and a bribe.

Accordingly, a new trial cannot be granted on these grounds.

g. General Requests for a New Trial Because the Verdict Was Against the Weight of the Evidence

Several of the convicted defendants request that a new trial be granted on the general grounds that the verdict was against the weight of the evidence. The Court rejects this argument and has already explained its reasons above for finding that a reasonable jury could have

concluded that there was sufficient evidence for each of the convictions as to each defendant.

h. Jury Confusion

Defendant Cleveland argues that he should be granted a new trial as to his conviction of tax conspiracy (Count 13) because his conviction was likely the result of jury confusion. Cleveland's main support for this hypothesis is that Cleveland was the only person convicted of tax conspiracy.

Cleveland's argument ignores the Court's response to the jury's question which made it clear that a defendant cannot conspire with himself. This was also clear from the Court's final jury instructions as to Count 13. *See* Court's Final Jury Instructions at 42-48. A jury is presumed to follow the instructions given to them by the Court. *Estes v. United States*, 335 F.2d 609, 614 (5th Cir. 1964); *United States v. Cauble*, 532 F. Supp. 804, 809-10 (E.D. Texas 1982).

Moreover, as noted above, there was sufficient evidence upon which the jury could have found that defendant Cleveland conspired with another member of his law firm. The acquittal of Cleveland's codefendants, therefore, did not necessarily indicate that the jury found that Cleveland conspired by himself. In short, the Court finds that the jury was most likely not confused. Fifth Circuit law holds that it is not an abuse of discretion to deny a motion for a new trial when the record contains substantial evidence that supports the jury's verdict. *See Turnbull v. United States*, 929 F.2d 173, 180-81 (5th Cir.

1991) (refusal to grant new trial does not result in miscarriage of justice when record is replete with evidence that supports the jury's verdict).

In any event, it is well settled that under Fifth Circuit law, courts generally do not presume that a conviction of only one defendant of a conspiracy means that the jury was confused. *Zuniga-Salinas*, 952 F.2d at 877-78. As the Supreme Court has noted, "inconsistent verdicts — even verdicts that acquit on a predicate offense while convicted on the compound offense — should not necessarily be interpreted as a windfall to the Government at the defendant's expense." *Powell*, 469 U.S. at 65, 105 S. Ct. at 476. Accordingly, Cleveland's request for a new trial on grounds of jury confusion is denied.

i. Telephone Access

Defendant Cleveland also requests a new trial and/or an evidentiary hearing on the grounds that the jurors had access to a telephone near the jury room during the course of the trial and the deliberations. The Court finds no merit in Cleveland's request. The jury was not sequestered. It had access to a telephone and other sources of information every evening when it left the courtroom. The jury did not have unrestricted access to a telephone during deliberations or the trial. In any event, the jury was continually instructed not to discuss the case with anyone. It must be assumed that the jurors followed those instructions. *Estes*, 335 F.2d at 614; *Cauble*, 532 F. Supp. at 809-10. Moreover, under Fifth Circuit law, a trial court need not hold an evidentiary hearing unless the defendant shows that improper external influences

were brought to bear on the jury's deliberative process. *See United States v. Martinez-Moncivais*, 14 F.3d 1030, 1036 (5th Cir.), *cert. denied*, 513 U.S. 816, 115 S. Ct. 72, 130 L. Ed. 2d 27 (1994). The defendant has made no such showing here. Accordingly, neither a new trial nor an evidentiary hearing is warranted.

j. The Dismissal of Juror Gerald O'Brien

Finally, defendant Cleveland requests a new trial on the grounds of an alleged third party contact with juror Gerald O'Brien. The Court finds no merit in Cleveland's arguments. The defendants specifically requested that Mr. O'Brien be dismissed as the result of the Government's reporting that a friend of Assistant United States Attorney Michael Magner had briefly talked to the juror. Defendants categorically rejected the alternative of having the Court make inquiry of Mr. O'Brien or of the third party. Defendants specifically waived any arguments about excusing the juror:

> Mr. Marabella: The defense has agreed. We have discussed it with the prosecution. Because of the facts, because of the perception, because of what potentially might be out there, we have agreed to excuse this juror. We would ask the Court not to interrogate that juror. We would put on the record whatever the Court wants in terms of waiver of interrogation.
>
> We are not suggesting at all that this juror did anything wrong. I'm not suggesting Mr. Magner did anything wrong or anybody in his family, but there is a perception there. There has been some discussion with that juror about this

> trial and the fact that someone he knows does know Mr. Magner. That may be helpful for Mr. Magner, it may hurt Mr. Magner, I don't know, but because of that everybody has agreed to put on the record that we would agree and waive any problems whatsoever about excusing him and move on to the next alternate.

Tr. of June 19, 1997 chambers conference.

The Court has seen no evidence of any wrongdoing on the Government's part. Mr. Magner brought the matter to the attention of the Court and the defendants in the first place. The facts as they were reported to the Court do not suggest any wrongdoing by the Government or the juror. The Government did not directly or indirectly contact the juror or engineer the third-party contact. The nature of the contact between the juror and the third-party was harmless. The juror did not participate in the deliberations at all. The "contact" occurred after the last day of evidence, and the juror was excused before deliberations began. There has been no manifest injustice here. A new trial is unwarranted and will not be granted on these grounds.

In short, the Court sees no reason to grant a judgment of acquittal as to any count for any of the convicted defendants. Nor does the Court see any grounds for granting a motion for a new trial. Accordingly,

IT IS ORDERED that defendant Maria Goodson's motion for judgment of acquittal is DENIED.

IT IS FURTHER ORDERED that defendant Larry Bankston's motion for judgment of acquittal is DENIED.

IT IS FURTHER ORDERED that defendant Fred Goodson's motion for judgment of acquittal is DENIED.

IT IS FURTHER ORDERED that defendant Carl Cleveland's motion for judgment of acquittal is DENIED.

IT IS FURTHER ORDERED that defendant Maria Goodson's motion for a new trial is DENIED.

IT IS FURTHER ORDERED that defendant Larry Bankston's motion for a new trial is DENIED.

IT IS FURTHER ORDERED that defendant Fred Goodson's motion for a new trial is DENIED.

IT IS FURTHER ORDERED that defendant Carl Cleveland's motion for a new trial is DENIED.

New Orleans, Louisiana, this 26th day of August, 1997

/s/ Sarah S. Vance
SARAH S. VANCE
UNITED STATES
DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	CRIMINAL ACTION
VERSUS	NO. 96-207
CARL W. CLEVELAND, ET AL.	SECTION "R" (1)

ORDER AND REASONS

(Filed Apr. 15, 1998)

On October 21, 1997, this Court issued a final order of forfeiture ordering that Carl W. Cleveland's and Fred H. Goodson's interests in Truck Stop Gaming, Inc. ("TSG, Inc.") and Truck Stop Gaming, Ltd. ("TSC, Ltd.") be condemned, forfeited and vested in the United States of America, pursuant to 18 U.S.C. § 1963(a)(1) and (a)(2). On October 31, 1997, Alexandros F. Goodson and Maria F. Goodson petitioned this Court to adjudicate their interests in the Truck Stop Gaming entities pursuant to 18 U.S.C. § 1963(1). A hearing was held in this matter on February 4, 1998, in which the entire record of both the criminal and forfeiture proceedings was incorporated into the record and additional testimony was taken and exhibits introduced for purposes of determining the ownership of the Truck Stop Gaming entities. After considering the relevant law, the evidence presented at the hearing, as well as the relevant portions of the record of the criminal and forfeiture proceedings, the Court rules as follows.

I. BACKGROUND

In its Forfeiture Order dated August 26, 1997, the Court determined that Carl W. Cleveland's and Fred H. Goodson's interests in TSG, Inc. and TSG, Ltd. were forfeitable to the United States of America pursuant to 18 U.S.C. § 1963(a)(1) and (a)(2). The Court made the following conclusions of law:

> 5. Based upon the jury's verdict and the evidence in the record from the criminal trial, the Government proved beyond a reasonable doubt that Goodson and Cleveland had an interest in Truck Stop Gaming, Ltd., Truck Stop Gaming, Inc., and O'Aces Video Poker Lounge which they acquired and/or maintained through violations of 18 U.S.C. § 1962. These interests are forfeitable to the United States pursuant to 18 U.S.C. § 1963(a)(1).
>
> . . . .
>
> 10. Based upon jury's verdict and the evidence in the record from the criminal trial, the Government proved beyond a reasonable doubt that defendants Goodson and Cleveland have an interest in, security of, claims against, and property and contractual rights in Truck Stop Gaming, Ltd.; Truck Stop Gaming, Inc.; and the O'Aces Video Poker Lounge, which interest provided Cleveland and Goodson with a source of influence over the operations of the enterprise and forfeitable to the United States pursuant to 18 U.S.C. § 1963(a)(2). In addition, as these entities were part of the RICO enterprise found in violation of 18 U.S.C. § 1962(c), they are forfeitable in their entirety.

Forfeiture Order (Aug. 26, 1997) at 20, 22-23.

On October 31, 1997, Maria F. Goodson, Alexandros F. Goodson, and Truck Stop Gaming, Inc. (collectively referred to as "petitioners") petitioned this Court to adjudicate their interests in TSG, Inc. and TSG, Ltd. Maria and Alex Goodson submit that they each own 50% of the stock of TSG, Inc. and that their ownership interests were acquired in 1992 at the time of the formation and incorporation of the company. Maria and Alex also assert that they are limited partners of, and they each own 49% of the partnership interest in, TSG, Ltd. They contend that their ownership interests were acquired in February of 1992 at the time of TSG, Ltd.'s formation. Truck Stop Gaming, Inc. submits that it is a general partner of TSG, Ltd. and currently owns 2% of its partnership interest. The Government contests petitioners' asserted interests and maintain that Fred Goodson and Carl Cleveland are the true or *de facto* owners of TSG, Ltd. and TSG, Inc.

II. DISCUSSION

Pursuant to 18 U.S.C. § 1963(1)(2), petitioners asked this Court for a hearing to adjudicate the validity of their alleged interests in TSG, Inc. and TSG, Ltd. To prevail on their claim, petitioners must establish by a preponderance of the evidence that:

> (A) the petitioner has the legal right, title, or interest in the property, and such right, title or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title or

> interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or
>
> (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section.

28 U.S.C. § 1963(1)(6). In support of petitioners' claims, Maria Goodson, Alex Goodson, and Douglas Handshoe testified at the hearing, and the petitioners presented evidence, most of which was drawn from the record of the criminal case. In rebuttal, and in defense of its claim to the forfeited property, the Government cross-examined the witnesses and presented evidence from the record of the criminal case. The Court also incorporated and considered the records of the criminal case and forfeiture proceeding.

Based on the evidence introduced at the criminal trial, this Court previously concluded that the jury could have found beyond a reasonable doubt that Fred Goodson and Carl Cleveland had "hidden ownership" interests in TSG, Inc. and TSG, Ltd., which were disguised by putting the businesses in the names of Alex and Maria Goodson. The evidence to support this conclusion is set forth in this Court's Post-Trial Order dated August 26, 1997, at 10-21, which is incorporated herein by reference and not repeated here. The Court notes that most of the exhibits cited in the Post-Trial Order were submitted by the Government at the February 4, 1998 hearing in defense of its claim to the forfeited property.

Although Maria and Alex Goodson denied that Goodson or Cleveland ever told them they were signing documents to hide Cleveland's or Goodson's interest in TSG, Inc. and TSG, Ltd., their testimony overall supports the conclusion that Fred Goodson and Carl Cleveland were the true owners of TSG, Inc. and TSG, Ltd. Alex Goodson admitted he would have signed whatever documents his father asked him to sign regardless of whether his father explained his role in the deal. Further, throughout his testimony, Alex Goodson referred to the TSG entities as a "business interest my father had," a "family business," and his father's "new business." Further, Alex understood his involvement with the companies as someone "executing the [ownership] document as an agent of the company," "in the capacity of a nominee." He had no understanding of the "contribution" that was attributed to him in the partnership agreement for TSG, Ltd. When asked about Schedule G to TSG, Ltd.'s video poker application — a document which Alex signed as the applicant — Alex said he did not really know what the $245,000 entry was, which was purportedly a note he was obligated to pay to Fred Goodson for the purpose of acquiring an ownership position in TSG, Ltd. *See* Pet. Exh. 5. Alex could not recall or explain the income claimed on his 1993 federal tax return in the amount of $162,213. Although Alex said he did not know what his purported interest in the TSG entities was, he seemed to recognize that despite the income reported on the return, he actually received a check for only enough income to pay the entities' taxes. The evidence at trial revealed that these types of decisions as to disposition of the partnership's income were made by Cleveland and Goodson. That Alex

Goodson did not consider that he had any real interest in the TSG entitles is evident by the fact that, after discussion with his accountant, he did not value that interest in his Statement of Financial Condition of December 31, 1994 at a time when he was seeking financing for another business. *See* Pet. Exh. F3. Apparently, it was not until the criminal investigation that Goodson learned something about what his interest in the businesses was supposed to be, but he still could not explain it. Rather than asserting that he owed 49% of TSG, Goodson said "I understand that I'm part of it in some type of way."

Maria Goodson's testimony likewise fell short of establishing that she and her brother, not Fred Goodson and Carl Cleveland, were the true owners of the Truck Stop Gaming entitles. Ms. Goodson was convicted of one count of mail fraud in the criminal trial. She testified in the forfeiture hearing that at the time the companies were formed and incorporated, she did not associate a company being "in her name" with ownership. she says she now knows she was an owner of the TSG entitles. She recalled receiving no explanation of any of the transaction documents when her father told her she needed to sign them. Further, her request for 1% of the net profits in TSG, Ltd., *see* Gov't Exh. T29, belies her asserted ownership interest of 49% of the partnership and 50% of its general partner. If she was in fact the owner of the TSG entities, she would not have had to ask her father or Carl Cleveland for an interest in a percentage of the companies' profits. Her after-the-fact efforts to "explain" that conversation were not credible. Maria was also unaware of the purported $370,000 "loan" from the Cleveland law

firm to herself in 1995. In summary, Ms. Goodson's testimony is that now she gets it — it has all been explained to her, now that there are forfeiture proceedings in which her father's interest stands to be forfeited. The Court finds this self-serving testimony short of the mark.

The Court also notes that it looks skeptically upon the documents submitted into evidence showing Maria's and Alex's asserted legal interests. As explained in this Court's Post-Trial Order (Aug. 26, 1997), Count 6 of the Superseding Indictment charged Maria Goodson, Fred Goodson, and Carl Cleveland with mail fraud. Specifically, the indictment charges that TSG, Ltd's 1995 license renewal was fraudulently obtained from the State of Louisiana by submitting false and incomplete information on applications and related affidavits submitted to the Louisiana State Police. One of two potential schemes underlying Count 6 was the defendants' failure to disclose to the State Police a "hidden ownership" interest in TSG, Ltd. held by Fred Goodson and Carl Cleveland, which was disguised by putting the business in the names of Maria and Alex. Given the defendant's exposure to criminal liability because of the license renewal application, it was in defendants' and petitioners' interest to prepare any records consistent with the criminal scheme.

III. CONCLUSION

Based on the evidence submitted in this proceeding, including the records of the criminal case and forfeiture hearing, the Court concludes that petitioners have not established by a preponderance of the evidence that (1) at the time of the commission of the acts giving rise to the

forfeiture, they had a legal right, title or interest in TSG, Inc. or TSG, Ltd. that was vested in them and not the defendants, or (2) they acquired a legal right, title or interest in the property from the defendants as a *bona fide* purchaser for value and, at the tie of the purchase, was reasonably without cause to believe that the property was subject to forfeiture. Instead, the Court finds that the petitioners' have no valid interests in TSG, Inc. and TSG, Ltd. for purposes of this forfeiture proceeding. For all of the foregoing reasons, the Court finds that Carl Cleveland and Fred Goodson are the true owners of TSG, Inc. and TSG, Ltd. and the Government is therefore entitled to forfeit the entitles in their entirety pursuant to this Court's Forfeiture Order (Aug. 26, 1997) and Final Order of Forfeiture (Oct. 21, 1997).

Accordingly, petitioners' claims are denied.

New Orleans, Louisiana, this 15th day of April, 1998.

/s/ Sarah Vance
SARAH S. VANCE
UNITED STATES
DISTRICT JUDGE

APPENDIX G

STATUTORY PROVISIONS

(18 U.S.C.)

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1963

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law –

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any –

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United

States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes –

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) All right, title and interest in property described in subsection (a) vests it the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (*l*) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

* * *

(*l*)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged

an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstance of the petitioner's right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the

record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that –

> **(A)** the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or
>
> **(B)** the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order or forfeiture and may warrant good title to any subsequent purchaser or transferee.

* * *

APPENDIX H

Gov't. Exhibit T29

The following is a transcript of recorded conversation which occurred on April 13, 1995, at telephone number 504-847-1147, EDLA 178.

Call #: 47
Time: 16:58 p.m.

Outgoing Call:

Participants: MARIA GOODSON (MG)
CARL CLEVELAND (CC)
ROSE LAST NAME UNKNOWN (RL)
Unintelligible (UI)

RL: Cleveland Firm, may I help you?

MG: ROSE?

RL: Uh huh.

MG: This is Maria Goodson, how are you?

UF: Just fine.

MG: Ah, is Mr. Cleveland in?

UF: Yes, he is.

MG: Ah, is he on the phone?

UF: No.

MG: Okay.

UF: Hold on just a moment please.

(Pause)

CC: Hello.

MG: Hello . . . Mr. Cleveland.

CC: Yeah.

MG: This is Maria, how are you?

CC: Hi, fine.

MG: Did you get in touch with daddy?

CC: I never got him.

MG: Okay.

CC: I tried a number of times and your line kept ringing busy if I . . .

MG: I.

CC: . . . was dialin' the right number.

MG: That's so strange . . . because he wanted you to call him so I don't . . .

CC: It was eight, four, seven . . . eleven forty-seven.

MG: Yes, sir.

CC: I dialed it, I was at a meeting where we didn't have a phone . . .

MG: Right.

CC: . . . in the room but I went to the pay phone a half a dozen times and got a busy signal each time. What's goin' on?

MG: That's strange. Nothin', I, there's somethin' that Monty Frankie wants to make a decision on and that dad wanted to talk to you about and dad's not at the office and I thought before I got, you know . . .

CC: What is it? Do you know what it is?

MG: I don't know what it is. I don't know what it is but they needed a decision yesterday, but after I speak to you, dad had to run home with someone so maybe you could catch him at the house.

CC: Why don't you tell him to make the decision however he thinks it ought'a be made and if it works he can take the credit and if it doesn't he can blame me. I'll be here until later.

MG: I don't know.

CC: I'm back in my office.

MG: Are you in your office right now?

CC: Yeah.

MG: Can you explain to me what's goin' on?

CC: With, with regard to what?

MG: With regard to me.

CC: Yeah . . . ah, you're dad told me the other day, we're tryin' to figure out what to do with the income at Truck Stop Gaming from last year.

MG: Uh huh.

CC: And I found out last year you and Alex reported it as income, paid taxes on it and left the money in Truck Stop Gaming.

MG: Okay.

CC: Except for the taxes that was distributed to you.

MG: Right.

CC: Ah . . . I just discovered day before yesterday, that we can't do that this year because no estimated tax payments based on last year's income level were reported for you and Alex.

MG: Oh, no.

CC: So there would be a huge penalty associated with not, with reporting it as your income.

MG: Okay.

CC: Because you didn't make the estimated tax payment.

MG: Right.

CC: So we've been searching for a way to avoid the penalty but get the taxes paid.

MG: Okay.

CC: And we finally decided that the thing to do is to distribute all of the income, roughly forty-nine percent, to this firm as attorney's fees over the last four years and fifty-one percent to your dad or to his management company – that we will pay the taxes and then lend all the money back to Truck Stop Gaming . . .

MG: Okay.

CC: . . . so the taxes'll get paid without penalty and in effect will do the same thing that you and Alex did last year.

MG: Okay.

CC: But we'll do it as a 1994 deduction for Truck Stop Gaming and 1995 income for us.

MG: Okay.

CC: So I think everybody agrees with that and your dad told me in the process what he would like to do is to pay bonuses to you and Alex and I told him I thought that was a terrific idea . . . and that maybe we ought'a do that separately.

MG: Okay, but if you get . . .

CC: So that's where we left it.

MG: Okay, well, this is what I told him and I don't know if you have a minute but I can . . . I went in his office 'cause Mr. Morgan called and said that daddy wanted to reorganize things and so on and so forth and take it out of his name and all that which is fine with me which I think he should do and so I said, Dad, I said you know, I mean I'm not . . . five years old, I would like to know what is going on, I would like to have, I'll take a cut in salary if you would give me, you know, one percent, you know, as an incentive, and I said and every two or three years I said . . .

CC: I don't . . .

MG: . . . another percent.

CC: . . . I don't want you to do that.

MG: But he won't . . . but he won't listen to me.

CC: Yeah, but I want, no, but you see what we're gonna do . . . is that it's all in your name now.

MG: Right.

CC: And what I wanna do is to leave it there for the moment.

MG: Right.

CC: We don't have to distribute it, we'll solve the problem in getting the tax paid with, with the distributions that I was talkin' about.

MG: Okay.

CC: Because I wanna convince your dad that the way to do it is to leave most of the interest in your name

and Alex's name so that he does. . . . so you guys don't have to pay estate taxes on that one day . . . and I proposed to him that he let me set up a family partnership that he will run as the managing partner but you and Alex will be the principal owners then.

MG: Okay, but that means that I don't get any money and I . . .

CC: No, it doesn't.

MG: . . . you know, until I'm fifty years old

CC: No, it doesn't. We'll get all of that resolved. Trust me.

MG: Okay, uhh. (laughs)

CC: What we're tryin' to do, I thought it was a major move for your dad to say well, shouldn't we pay a bonus (UI).

(Tape changed)

CC: We need to get through the summer and try to get the operation stabilized and . . .

MG: Right.

CC: . . . figure out how many of these things we're gonna be running and if we get gassed on a few of them to get the debt paid and then we have to decide where these interests are going and who's gonna own what. But I want you to let me take the responsibility for convincing your dad that virtually none of the ownership should go to him, that he ought'a get what he gets out of it in salary.

MG: Okay, now that's not . . . you know, I, I can understand that . . .

CC: But I promise you . . .

MG: . . . but the way that he presented it to me and to ah, mother and I was that he would have . . . by setting up that trust that he would have control over it.

CC: It's not a trust, a partnership.

MG: Okay, well he said a trust, but by setting up that partnership that he would have control of it, in other words if I received some sort of income because, because of a, of percentage that I had that he would not relinquish that to me because he had control of my trust, do you understand?

CC: No. That's not what we have (UI) about this.

MG: You know, and I think what you need to relay to him, his feeling is that if I have money I will move out.

CC: Alright.

MG: Well, yes, thank you, that's why I want it.

CC: Maria . . .

MG: You know, what?

CC: Trust me.

MG: I do . . . but . . .

CC: I understand the problem.

MG: . . . but in the process of all of this can you please explain to him that I am old enough to, you know, if I wanna spend it in a day, that's my business.

CC: I have.

MG: But if I wanna keep it for a hundred years that's my business too.

CC: I have . . . I will . . . and I will continue to do it.

MG: Okay.

CC: And it is having an effect, I promise you.

MG: Okay.

CC: Don't be nervous.

MG: I'm not nervous. I'm not nervous and nor, I want to relay this to you also, nor am I antsy, you know, and want something before I'm ripened and before it's time by no means, but I do think that I deserve what I work for and if I work seven days a week, you know, I mean that's . . . you know, it's only fair.

CC: Just remember that I'm telling you that you are setting your sights too low and I want you to let me have a more active role in deciding what is appropriate for you now.

MG: Okay. But I, but I don't wanna, I don't wanna be inhibited because I'm only twenty-seven and therefore I shouldn't have any money.

CC: Don't worry.

MG: Okay. That's what I'm worried about.

CC: Okay.

MG: Okay, do you . . .

CC: And if, if your Dad doesn't really need me I desperately need to work on somethin' else, I've got an office full of people waiting for me and I got . . .

MG: Okay, so you want me to tell him to just make the decision on his own.

CC: Tell him I'd really appreciate it he would . . .

MG: Okay.

CC: . . . and again pass somethin' if it doesn't work blame it on me and if it works he gets the credit.

MG: Okay, thanks. Have a nice Easter.

CC: (UI).

MG: Bye.

CC: Maria.

MG: Yes.

CC: Trust me.

MG: I do, I, and trust you, I trust you implicitly.

CC: Good.

MG: Okay.

CC: Bye.

MG: Bye.

(End of conversation)

Gov't Exhibit T44A

The following is a transcript of a portion of a recorded conversation which occurred on May 23, 1995, on telephone number (504) 847-1147, EDLA 178.

Call #: 037
Time: 16:20 p.m.
Incoming Call

Participants: MARIA GOODSON (MG)
JOE MORGAN (JM)
UNKNOWN FEMALE (UF)

UF: Oasis Gaming may I help you?

JM: Yeah this is Joe Morgan is Maria in please?

UF: Ah one moment please I don't believe so let me check that may I say who's calling?

JM: Yes Joe Morgan.

UF: Thank you sir.

(On hold)

UF: Mr. Morgan he isn't in I'm sorry can I take a message?

JM: Yeah I asked for Maria she's not there either?

UF: I'm sorry sir she is in, just a moment.

* * *

MG: Hello.

JM: Hey.

MG: Hey were you holding for me?

JM: Yep.

MG: I just assumed cause she didn't I didn't hear her I'm in the other office.

JM: (laughs)

MG: What's going on?

JM: Did you get my fax?

MG: Yes I did.

JM: Okay.

MG: But ah it's been non-stop.

JM: Okay.

MG: So ah let me see if I can go through it right now.

JM: Most of this is in the old checkbook.

MG: Yeah that's what I'm looking at right now and the one you had faxed me about yesterday.

JM: Yeah.

MG: Uh did Miss Morgan give you the message?

JM: Yes she did but I don't,

MG: I was like, I was like what is he talking about?

JM: Yeah.

MG: It's Louisiana Travel Center's Association.

JM: Tell me what that is again.

MG: That is our

JM: Your workmen's comp?

MG: No that's our truck stop association but we don't call it truck stop we call it travel center, that's the truck stop association that we're in

JM: okay

MG: So we can lobby and so on and so forth

JM: Oh okay

MG: It's just

JM: It used to be what they called it ah certified truck stop

MG: Certified truck stop we we all those certified truck stop and Louisiana truck stop all of those disbanded

JM: Okay

MG: Okay and we formed the Louisiana Travel Centers Association so that the name truck stop wouldn't like be out there

JM: Okay.

MG: Okay and those were association dues $5,000

JM: Okay

MG: Okay. Hold on my feet are hot it's hot back here okay, okay, 2619 to Jim Carey

JM: Okay

MG: Daddy did this so when daddy does it you know he fills in ah

JM: Well I didn't even have copies of them and that's what I'm surprised you know used to be you all xerox and stuff sent I didn't even have copies of

MG: I know but he went back and filled this in and if it's written in his handwriting it means that he went back and filled in.

JM: Okay what's the date on it.

MG: That's 11/1

JM: 11/1

MG: Okay and it's 2150 for $3.64 and 5001.

JM: How much was 2150?

MG: $3.64.

JM: $3.64

MG: And then 5001 is the balance of $90.99.

JM: Okay.

MG: Okay um 2620 is Bell South Mobility so it's Dad's car phone.

JM: Okay.

MG: Okay 2621 is the Century News and that's under ah code 6020 for advertising

JM: Okay.

MG: Ah ah 2622 these are all dates 11/1 by the way.

JM: okay.

MG: Is Louisiana Coca Coca Bottling Company

JM: Rent

MG: Rent 6105

JM: Okay

MG: Rent on equipment 2720 let's see what that is 2720 okay is that corporation that dad formed called BAJ, LLC. It's um they have become 5. 4.9 percent partners or whatever and that check is dated 12/1 that is their monthly that's their check for September and October

JM: Okay

MG: Let me . . . a September's amount is ah $5415 and 26 cents.

JM: No that's alright ah, I've got a . . .

MG: You don't need it.

JM: . . . total is all made out to BAJ, LLC.

MG: Yeah.

JM: Or whatever that is.

MG: That's September and October okay.

JM: Now that, that we set up a separate account for then didn't we?

MG: Yeah.

JM: Okay.

END OF EXCERPT

Gov't Exhibit T55B

The following is a transcript of a portion of a recorded conversation which occurred on July 7, 1995, on telephone number (504) 847-1105, EDLA 179.

Call #:50
Time: 5:19 p.m.
Incoming Call

Participants: KITTY ROGERS (KR)
MARIA GOODSON (MG)
Unintelligible (UI)

* * *

KR: But let me tell you this first ah, so you can pass it on to your mom and Alex.

MG: Okay.

KR: . . . and your dad. My dad wants all . . . the whole Goodson family to come in tomorrow at noon.

MG: Okay.

KR: Ah, he and Tim have been brainstorming. They have lots of really good options for us.

MG: Um hum.

KR: Ah, one of the things he's gonna recommend is that we sell to Harold ah, and I don't want to say his last name in case you're . . .

MG: Right, right, right.

KR: . . . bugged. Ah, which is definitely . . . which is my idea today also.

MG: Um hum.

KR: Ah, so that maybe the best thing for everyone, but it's just one of many good options that he has thought of.

MG: Um hum.

KR: He doesn't want anyone to get down. We're gonna fight this to the end . . . (Switch from Tape 1 to Tape 2) . . .

KR: Wait. Say that again.

MG: I'm just gonna come down and help too.

KR: Tomorrow?

MG: Yeah. (UI).

KR: I mean we want you here anyway.

MG: Huh?

KR: We want you and your fam . . .

MG: I know.

KR: Okay. There's really . . . legally, there's . . . I mean they're gonna meet . . . I think my dad and . . .

MG: Hold on one second . . .

KR: Okay.

MG: . . . 'cause my last employee is going. Okay. Hold on.

KR: Okay.

(Pause)

(MG to talking to someone in background)

MG: Okay.

KR: You okay?

MG: Yeah. I'm all right.

KR: Ah, okay. So they're gonna talk about . . . we have all kinds of . . . we have a whole agenda for the whole day. So . . .

MG: Okay.

KR: . . . ah, but the main thing we want you all to do is to come in tomorrow at noon. So will you pass that on to your dad and mom and Alex.

MG: Okay. I don't know if my brother's gonna make it, but . . .

KR: But he can try.

MG: Ah, I don't even think we want to tell him. But anyway . . .

KR: Why?

MG: There's just a lot of problems.

KR: Okay.

MG: Basically they haven't even called us to say anything.

KR: Really?

MG: Um um. No. There's a lot of problems between he and my father.

KR: Oh.

MG: I alluded to that with Jean-Paul and I said my dad's too egotistical to say anything. I said, but you know, I said we need to remove him from the . . . everything, because he's just . . . he's a hot head and I said.

KR: Alex?

MG: Yeah.

KR: Uh huh.

MG: It's bad. But anyway, so . . .

KR: Well, we will work that out.

MG: . . . I don't even think it's worth mentioning to him. I mean the decisions that we make we'll make on our own and then we can just tell him.

KR: Okay. Ah, I'll leave that up to you all.

MG: Okay. So 12 o'clock tomorrow?

KR: Twelve o'clock tomorrow. We have lots of good things to talk about.

END OF EXCERPT

MARIA GOODSON EXHIBIT 1

[LOGO] [SEAL]

LOUISIANA DEPARTMENT OF PUBLIC SAFETY
AND CORRECTIONS OFFICE OF STATE POLICE
VIDEO GAMING DIVISION
P. O. BOX 66614
BATON ROUGE, LA 70896-6614

3600/246/GRB/021

TO: VIDEO GAMING DEVICE DISTRIBUTORS AND OWNERS

FROM: LIEUTENANT RILEY BLACKWELDER
LOUISIANA STATE POLICE
VIDEO GAMING DIVISION

RE: LICENSE APPLICATION

The Division is accepting applications for those interested in being licensed in Louisiana as a distributor and/or owner of video gaming devices. Enclosed is your application packet which is to be completed in its entirety and returned to the following address:

Louisiana State Police
GES, Video Gaming Division
P.O. Box 66614
Baton Rouge, LA 70896

An instruction sheet is enclosed to explain which forms need to be completed by applicant, owners, partners, major stockholders, officers, and directors. Include form "Consent to Disclosure of Tax Information" for applicant and all appropriate individuals and entities. Fingerprint cards need to be completed in their entirety with close

attention given to details as explained on the back of cards.

To avoid any unnecessary delays in considering each applicant for licensing, applications are due back to the Division by February 29, 1992. A non-refundable license/ application fee of $3000 for distributors and $1000 for device owners must accompany each application.

Prior to licensing, all distributor and owner applicants will be required to have a state tax identification number, obtainable from the Louisiana Department of Revenue and Taxation. In addition, all corporations and partnerships will be required to be certified by the Louisiana Secretary of State and provide evidence of such.

In closing, I would like to thank you for your continued interest and support of the video gaming industry in Louisiana. The Division is looking forward to a long and prosperous future for the industry. If we can be of any assistance or should you need additional forms please call (504) 925-1900.

[LOGO] [SEAL]

LOUISIANA DEPARTMENT OF PUBLIC SAFETY
AND CORRECTIONS OFFICE OF STATE POLICE
VIDEO GAMING DIVISION
P. O. BOX 66614
BATON ROUGE, LA 70896-6614

An applicant for a Louisiana Video Gaming License is seeking the granting of a privilege and the burden of proving and maintaining his qualifications to receive

such a license is at all times on the applicant. An applicant must accept any risk of adverse public notice, embarrassment, criticism, or other action, or financial loss which may result from action with respect to an application, and expressly waives any claim for damages as a result thereof.

The following forms and items must be submitted to the Louisiana State Police, Video Gaming Division, Gaming Enforcement Section, in conjunction with your application for a Video Gaming License.

1. APPLICATION: To be filed on behalf of the person or business entity seeking to be licensed with the Louisiana State Police, Video Gaming Division.

2. PERSONAL HISTORY RECORD, FINANCIAL QUESTIONNAIRE, FINGERPRINT CARDS, AFFIDAVIT OF FULL DISCLOSURE, APPLICANT'S REQUEST TO RELEASE INFORMATION, RELEASE OF ALL CLAIMS, AND CONSENT TO DISCLOSURE OF TAX INFORMATION FORMS: To be filed by every person who has more than a five percent interest, direct or indirect, in the business entity *INCLUDING ALL* officers and directors regardless of percentage of ownership. Stockholders of a closed corporation must provide the above information as well. Certain officers, directors, and stockholders in a publicly-traded corporation must be found suitable for licensing. The Louisiana State Police, Video Gaming Division, has the right to require any individual who has a financial interest of any nature to meet suitability requirements as provided in L.R.S. 33:4862.1 et seq.

3. A complete list of all major stockholders (over five percent) and/or partners showing the number of shares and/or interest of record held by each.

4. Disclosure of all persons whose comments, advice, or recommendations are influential and recognized by the corporation.

5. Additional information if required by the Division.

INSTRUCTIONS

a.) Complete an application for *each* type of license requested.

b.) All forms are to be completed in their entirety.

c.) Extra copies of any required forms may be obtained from the Louisiana State Police, Video Gaming Division or may be duplicated by the applicant if the quality of the copies is maintained.

d.) Original forms with signatures signed in original ink, are required to be submitted to the Division for processing.

e.) Completed applications are to be submitted with the appropriate non-refundable license fees, as required by L.R.S. 33:4862.1 et seq.

CLEVELAND EXHIBIT 10

[SEAL]

STATE OF LOUISIANA
DEPARTMENT OF PUBLIC SAFETY AND
CORRECTIONS PUBLIC SAFETY SERVICES

EDWIN W. EDWARDS
GOVERNOR

COL. PAUL W. FONTENOT
SUPERINTENDENT

09-25-95

Hammond Gaming LLC
Fred H. Goodson Contact Person
P.O. Box 1361
Slidell, La. 70459

Dear Owners, Officers, and Directors,

The Division is in the process of reviewing truckstop licensees for compliance with R.S. 33:4862, the Video Draw Poker Device Control Law. As you know this statute was revised by the Third Extraordinary Session of the 1994 State Legislature. The law provides specific requirements truckstops must meet to be licensed for Video Gaming. The law allowed existing truckstop licensees until January 1, 1996 to upgrade their facilities to meet certain standards.

There is certain information you can provide to complete this review. R.S. 33:4862.10 addresses suitability requirements. R.S. 33:4862.10 D states "Every person who has or controls directly or indirectly more than a five percent ownership, income, or profit interest in an entity which has or applies for a license in accordance with the provisions of this part, or who receives more than five percent revenue interest in the form of a commission, finders fee, loan repayment, or any other business expense related to

the gaming operation, or who has the ability, in the opinion of the Division, to exercise a significant influence over the activities of a licensee authorized or to be authorized by this part, shall meet all suitability requirements and qualifications for licensees:"

I request you forward me a list of all individuals and companies who has or controls directly or indirectly more than five percent ownership, income, or profit interest in a licensed entity you are associated with and a list of those who receive more than five percent interest in the form of a commission, finders fee, loan repayment, or any other business expense related to the gaming operation.

Include a copy of all contracts you have with, Video Gaming Device Owners, and any individual or company that recieves [sic] proceeds from the Video Gaming operation.

Footnote each contract with the names of those receiving proceeds, the specific reason they recieve [sic] a portion of the process, and the service they provide for the proceeds. Although the law requires information on those recieving [sic] in excess of five percent the Division wants to account for one hundred percent of gross device revenue at each establishment. Therefore you will need to include those individuals, companies, corporations, and LLC's receiving any amount of the device proceeds.

Be thorough with the information you return as it will be compared to the information on file in Baton Rouge and to computer printouts of gross device revenue at each location. You may mail your responce [sic] to the address

listed below by October 13, 1995. I appreciate your cooperation.

Sincerely,

S/T Doug Anderson
Louisiana State Police
Video Gaming Division
3654 Government Street
Alexandria, La. 71302
(318) 484-2423

Gov't. Exhibit 14

SALE OF PARTNERSHIP INTEREST AND PLEDGE AGREEMENT

BEFORE ME, the undersigned Notary, personally came and appeared Maria F. Goodson ("Seller"), who, for and in consideration of the mutual covenants contained herein, does hereby assign, sell, convey and deliver unto Benjamin B. Rayburn ("Purchaser"), Jr. a 4.99% interest out of a 100% interest in the Truck Stop Gaming, Ltd. partnership on the following terms and conditions, to-wit:

1. **Partnership Interest.** The partnership interest conveyed herein is a limited partnership interest and is being conveyed without any warranty whatsoever, after Purchaser has had an opportunity to examine the books and records of the partnership business and to inform himself about the business of the partnership which is the conduct of video poker gaming activities at the Slidell 76 Auto/Truck Plaza in Slidell, Louisiana.

2. **Purchase Price.** The purchase price of the interest conveyed herein shall be $25,000 represented by a promissory note payable on demand with interest at 8% per annum from date until paid, and on such further terms and conditions as are set forth in the said promissory note.

3. **Additional Consideration.** As additional consideration for the transfer of the interest contemplated herein, Purchaser has agreed to provide assistance to Seller from time to time in the operation of the business, negotiation of agreements, and attempts to establish similar businesses at other truck stops around the State of

Louisiana without additional compensation to Purchaser beyond the acquisition of the ownership of the partnership interest conveyed herein.

4. **Limitation of Financial Interest.** Purchaser recognizes and acknowledges that Seller and the other owner of Truck Stop Gaming, Ltd. are attempting to negotiate for and become involved in the operation of video poker at other truck stops in the State of Louisiana, and that it is the intention of the parties to this agreement that Purchaser's interest in the business operations of the partnership shall be limited to the video poker gaming activities of the partnership conducted at the Slidell 76 Auto/Truck Plaza in Slidell, Louisiana. If the partnership becomes involved in other operations which produce gain or loss, Purchaser shall have no interest in such gain or loss, but shall be limited to Purchaser's interest in the assets of and the profit or loss from the operations conducted by the partnership in Slidell, Louisiana, at the Slidell 76 Auto/Truck Plaza. Seller agrees to cause Truck Stop Gaming, Ltd., in the event that it becomes involved in other ventures, to separately account for the assets and liabilities of the Slidell operation and its income or loss so that Purchaser's share of income or loss can be distributed to Purchaser at any time upon request by Purchaser.

5. **Limitation on Resale.** The interest conveyed herein by Seller to Purchaser shall not be conveyed by Purchaser to any third party. In the event that Purchaser receives an offer from a third party for the acquisition of Purchaser's interest, Seller shall have a right to reacquire Purchaser's interest for the lesser of the price offered by a third-party bona fide purchaser or the price originally

paid by Purchaser for the acquisition of the interest conveyed herein.

6. **Effective Date.** This agreement shall take effect as of the 1st day of August, 1994, and Purchaser shall be entitled to the distribution of Purchaser's pro rata share of monthly net income before federal income taxes after deduction from income for non-deductible cash expenditures as reflected on the operating statements of the income and expense of the Slidell 76 video poker facility known as O'Aces. To the extent possible, cash distributions will be made monthly at the end of each month as soon as operating statements can be prepared such that the first distribution to Purchaser or Purchaser's share of income or loss from said operations shall be made on or about September 15, 1994.

7. **Conversion of Purchaser's Interest to Interests in Other Operations.** Purchaser and Seller take cognizance of the fact that Purchaser may have an interest in exchanging the interest acquired in the Slidell 76 Auto/Truck Plaza video poker operations for an equal interest in another video poker facility operated at some other place in the State of Louisiana. Purchaser and Seller agree to make a good faith effort to arrange for a swap of the interest of Purchaser acquired herein for such other interest on such terms and conditions as Purchaser and Seller might agree in the future, if as and when such opportunity arises.

8. **Pledge of Acquired Interest.** Purchaser hereby pledges to Seller as security for the promissory note described herein the 4.99% interest in Truck Stop Gaming, Ltd. acquired simultaneously herewith by Purchaser.

Such pledge shall continue in full force and effect until the promissory note described herein has been paid in full.

9. **Cash Distributions.** Seller agrees to cause the partnership to distribute to Purchaser [sic] Purchaser's pro rata share of monthly income derived from the video poker gaming operations at the O'Aces facility of the Slidell 76 Auto/Truck Plaza on a monthly basis in arrears as described herein, and Seller guarantees that Purchaser will be distributed an amount at least equal to 42% of Purchaser's share of income which would be an amount sufficient to pay federal income taxes on Purchaser's share of income. Anything contained herein to the contrary notwithstanding, Purchaser's full share of annual profits from the operations described herein shall be distributed to Purchaser at least annually.

10. **Construction and Ambiguity.** The fact that this agreement has been prepared by the attorney for one party or the other to this agreement shall not be used as a basis for construing any ambiguity which might arise herein for or against either party hereto.

THUS DONE AND EXECUTED in multiple originals effective the 1st day of August, 1994, at New Orleans, Louisiana.

WITNESSES:

/s/ Terri S. Schallenberg
/s/ Illegible
/s/ Maria F. Goodson
MARIA F. GOODSON, Seller
/s/ B. B. Rayburn, Jr.
BENJAMIN B. RAYBURN, JR., Purchaser

/s/ Carl W. Cleveland
CARL W. CLEVELAND
NOTARY PUBLIC

Supreme Court, U.S.
FILED
APR 24 2000
CLERK

(2)

No. 99-1393

In the Supreme Court of the United States

MARIA F. GOODSON AND ALEXANDROS F. GOODSON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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Counsel of Record

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Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

18pp

QUESTIONS PRESENTED

1. Whether video poker licenses issued by the State of Louisiana constitute "property" within the meaning of the mail fraud statute, 18 U.S.C. 1341.

2. Whether petitioner Maria Goodson had fair notice that her misrepresentations on applications for video poker licenses could constitute a violation of the mail fraud statute.

3. Whether the district court committed plain error in failing to instruct the jury on the materiality element of a mail-fraud offense.

4. Whether the court of appeals applied an incorrect standard in rejecting petitioner Maria Goodson's claim that the evidence was insufficient to support her mail fraud conviction.

5. Whether the district court correctly ordered the forfeiture of two companies in connection with the RICO convictions of co-defendants Carl Cleveland and Fred Goodson despite petitioners' claim that they were the true owners of the companies.

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In the Supreme Court of the United States

No. 99-1393

MARIA F. GOODSON AND ALEXANDROS F. GOODSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is reported at 182 F.3d 296. The opinion of the district court holding that unissued video poker licenses are "property" within the meaning of the mail fraud statute (Pet. App. 50a-84a) is reported at 951 F. Supp. 1249. The orders of the district court denying petitioner Maria Goodson's motion for judgment of acquittal (Pet. App. 85a-166a) and both petitioners' third-party claims to forfeited property (Pet. App. 167a-174a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1999. The petitions for rehearing were denied on September 22, 1999 (Pet. App. 45a-49a). The petition for a writ of certiorari was filed on December 21,

1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner Maria Goodson was convicted on one count of mail fraud, in violation of 18 U.S.C. 1341. She was sentenced to six months' imprisonment, to be followed by six months' home detention. The district court then ordered the forfeiture of two co-defendants' ownership interests in two companies, rejecting both petitioners' claims that they were the true owners of those companies. The court of appeals affirmed Maria Goodson's conviction and the judgment of forfeiture. Pet. App. 1a-44a.

1. Petitioners are the adult children of Fred Goodson. In 1992, Fred Goodson and his family formed Truck Stop Gaming, Ltd. (TSG, Ltd.), and its corporate partner, Truck Stop Gaming, Inc. (TSG, Inc.), in order to participate in the video poker business at their truck stop in Slidell, Louisiana. With the assistance of attorney Carl Cleveland, the Goodsons prepared applications for a gaming license for TSG, Ltd., and submitted the applications to the licensing authority, the Louisiana State Police. The application requires a partnership seeking a gaming license to identify its partners, to submit personal financial statements for all partners, to affirm that the listed partners are the sole beneficial owners, and to affirm that no partner has an arrangement to hold his interest as "an agent, nominee or otherwise," or a present intention to transfer any interest in the partnership at a future time. Pet. App. 2a-3a.

The initial application submitted on behalf of TSG, Ltd., identified petitioners as the limited partners and

TSG, Inc., as the general partner. The application listed no other persons or entities as having any ownership interest in TSG, Ltd. TSG, Ltd., submitted renewal applications in 1993, 1994, and 1995 that likewise listed no additional ownership interests. In fact, the true owners of TSG, Ltd., at all times were Fred Goodson and Carl Cleveland, who concealed their ownership interest from state regulators to avoid an inquiry into their suitability as licensees. Pet. App. 3a-4a, 5a-6a.

In 1994, Maria Goodson executed a "Sale of Partnership Interest and Pledge Agreement," which conveyed a 4.99% interest in TSG, Ltd., to Benny Rayburn, the adult son of Louisiana State Senator Benjamin Rayburn. The younger Rayburn's interest was not disclosed in TSG, Ltd.'s 1995 license renewal application. Pet. App. 4a n.4, 5a.

2. In 1996, a federal grand jury indicted Maria Goodson, Fred Goodson, Cleveland, then-former State Senator Rayburn, and others on multiple counts of mail fraud, racketeering, and various other offenses.[1] The indictment alleged, among other things, that the defendants committed mail fraud, in violation of 18 U.S.C. 1341, by obtaining a video poker license for TSG, Ltd., in 1992, and renewing the license in 1993, 1994, and 1995, by fraudulently concealing that Fred Goodson and Cleveland were the true owners of TSG, Ltd. Pet. App. 5a.

a. Before trial, various defendants, including Maria Goodson, moved to dismiss the mail fraud counts on the ground that state licenses to operate video poker sites do not constitute "property" within the meaning of

---

[1] Petitioner Alexandros Goodson was identified as an unindicted co-conspirator. Pet. App. 5a n.5.

Section 1341, which makes it a crime to use the mails in connection with "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1341. They contended that a scheme to acquire a state gaming license through false representations does not implicate any property interest of the State, arguing that such licenses have no value to the State and, consequently, do not become property until they are issued by the State to a private party.

The district court denied the motion. Pet. App. 71a-84a. The court concluded that "licenses constitute property even before they are issued," agreeing with the position of the First Circuit and the Third Circuit on that question. *Id.* at 79a; see also *id.* at 75a-77a (citing *United States* v. *Bucuvalas*, 970 F.2d 937 (1st Cir. 1992), cert. denied, 507 U.S. 959 (1993), and *United States* v. *Martinez*, 905 F.2d 709 (3d Cir.), cert. denied, 498 U.S. 1017 (1990)). The court distinguished cases involving other sorts of licenses, such as taxi licenses, in which a government was held to have only a regulatory interest, and not a property interest. The court reasoned that the State of Louisiana clearly has a property interest in video poker licenses, because the State "receives a significant percentage of revenue" from the licenses and "continues to exercise a great deal of control" over them. Pet. App. 81a.

b. The jury found Maria Goodson guilty on Count 6 of the indictment, which charged mail fraud in connection with the 1995 video poker license renewal application for TSG, Ltd. The district court denied Maria Goodson's post-verdict motion for a judgment of acquittal on that count. Pet. App. 89a-91a. The court explained that the indictment charged Maria Goodson with failure to disclose both (i) the ownership interest

in TSG, Ltd., that Fred Goodson and Cleveland possessed from the outset, and (ii) the ownership interest in TSG, Ltd., that Benny Rayburn acquired in 1994. The court concluded that "the jury could have found Maria Goodson guilty beyond a reasonable doubt of Count 6 on either or both theories." *Id.* at 91a.

c. The same jury found Fred Goodson and Cleveland guilty of violations of the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. 1961 *et seq.* The district court, at the government's request, ordered the forfeiture of the two men's interests in TSG, Ltd., and TSG, Inc. See 18 U.S.C. 1963(a) (describing money and property that is subject to forfeiture under RICO).

Petitioners filed petitions of intervention in the forfeiture proceedings, pursuant to 18 U.S.C. 1963(*l*)(2), asserting that they were the record owners of TSG, Ltd., and TSG, Inc. After an evidentiary hearing, the district court denied petitioners' claims. The court found that Fred Goodson and Cleveland were the "true owners" of the companies and that their ownership interests had been properly forfeited to the government. Pet. App. 174a.

3. The court of appeals affirmed Maria Goodson's conviction and sentence and the judgment of forfeiture. Pet. App. 1a-44a.

a. The court of appeals rejected Maria Goodson's contention that a video poker license does not constitute property for purposes of the mail fraud statute. Pet. App. 19a. The court relied on its recent opinion in *United States* v. *Salvatore*, 110 F.3d 1131, 1139-1143 (5th Cir.), cert. denied, 522 U.S. 981 (1997), which held that Louisiana had a property interest in an unissued video poker license.

b. The court of appeals next rejected Maria Goodson's contention that she lacked fair notice that her conduct constituted a crime. Pet. App. 19a-21a. The court noted that, at the time of Maria Goodson's offense, "at least two circuits" had held that unissued licenses are property for mail fraud purposes. *Id.* at 20a. The court concluded that these decisions afforded Maria Goodson "reasonable opportunity to know that [her] conduct could be proscribed by the mail fraud statute." *Ibid.*

c. The court of appeals further held that the evidence was sufficient to support Maria Goodson's conviction. Pet. App. 32a-33a. The court explained that, "[b]ecause the jury need only have found Maria Goodson guilty beyond a reasonable doubt on one of the two potential schemes underlying her mail fraud conviction," the court would consider the evidence relating to only one of those schemes, the scheme to conceal Benny Rayburn's ownership interest in TSG, Ltd. *Id.* at 32a. The court found that Maria Goodson's participation in that scheme was adequately established by evidence (i) that she transferred a 4.99% ownership interest in TSG, Ltd., to Benny Rayburn in 1994, (ii) that the transfer was not reported in TSG, Ltd.'s 1995 license renewal application, and (iii) that she was aware of the transfer of ownership to Benny Rayburn. *Id.* at 32a-33a.

d. The court of appeals affirmed the forfeiture of the interests of Fred Goodson and Cleveland in TSG, Ltd., and TSG, Inc. Pet. App. 40a-44a. The court rejected petitioners' contention that the forfeiture was erroneous because they were listed as the record owners of those companies in the Agreement of Partnership that they filed with the Louisiana Secretary of State. The court declined to give weight to the "obviously false partnership agreement," explaining that petitioners

were "straw people used in the sham to hide the true ownership of [the companies]." *Id.* at 42a.

e. After oral argument on petitioners' appeal, Maria Goodson sought leave to file a supplemental brief based on this Court's intervening decision in *Neder* v. *United States*, 527 U.S. 1, 20-25 (1999), which held that the materiality of the falsehoods made in a scheme to defraud is an element of a mail fraud offense. She argued that the district court committed plain error in failing to give a materiality instruction. The government opposed the motion. The government argued that the issue had been waived and, in any event, that the district court had included materiality language in the jury charge and the defendants had argued materiality to the jury. The court of appeals denied the motion to file a supplemental brief and did not address the issue in its opinion.

DISCUSSION

1. Maria Goodson contends (Pet. 16-19) that unissued video poker licenses in the hands of the State do not constitute "property" within the meaning of the federal mail fraud statute, 18 U.S.C. 1341. This Court has granted the petition for a writ of certiorari of her co-defendant Carl Cleveland on the identical issue. *Cleveland* v. *United States*, 120 S. Ct. 1416 (2000) (No. 99-804). Accordingly, the Court should hold this petition pending the decision in *Cleveland* and dispose of the petition as appropriate in light of that decision.

2. Maria Goodson next contends (Pet. 19-20) that she lacked fair notice that 18 U.S.C. 1341 proscribes the conduct for which she was convicted. She notes that the Fifth Circuit had not yet decided at the time of her offense, as it did subsequently in *United States* v. *Salvatore*, 110 F.3d 1131, cert. denied, 522 U.S. 981

(1997), that unissued video poker licenses constitute "property" for purposes of the mail fraud statute, and that the other courts of appeals that had addressed the general question of whether unissued licenses constitute "property" were in conflict.

There is no due process bar to applying the holding in *Salvatore* to Maria Goodson. Due process bars retroactive application of a judicial construction of a law only if the construction was not reasonably foreseeable. See *United States* v. *Rodgers*, 466 U.S. 475, 484 (1984); *Brown* v. *Ohio*, 432 U.S. 161, 169 n.8 (1977). This Court has held that a judicial construction of a statute is reasonably foreseeable when some circuits have adopted it, even if others have rejected it. *Rodgers*, 466 U.S. at 484; cf. *United States* v. *Lanier*, 520 U.S. 259, 266 (1997) ("[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor *any* prior judicial decision has fairly disclosed to be within its scope.") (emphasis added). Here, at the time that Maria Goodson committed her offense, several circuits had held that an unissued license may constitute "property" for purposes of the mail fraud statute. See *United States* v. *Bucuvalas*, 970 F.2d 937, 944 (1st Cir. 1992), cert. denied, 507 U.S. 959 (1993); *Borre* v. *United States*, 940 F.2d 215, 222 (7th Cir. 1991); *United States* v. *Martinez*, 905 F.2d 709, 715 (3d Cir.), cert. denied, 498 U.S. 1017 (1990); *United States* v. *Italiano*, 894 F.2d 1280, 1285 n.6 (11th Cir.), cert. denied, 498 U.S. 896 (1990). Those decisions were sufficient to make it reasonably foreseeable to Maria Goodson that the Fifth Circuit might conclude that the submission to the State of fraudulent applications to acquire or renew a video poker license would be held to involve "property" within the meaning of the mail fraud statute.

Maria Goodson's reliance on *Lanier*, *supra*, and *Wilson* v. *Layne*, 526 U.S. 603 (1999), is misplaced. Neither case concerned whether due process barred the retroactive application to a defendant of a judicial construction of a criminal statute that had been adopted by several courts of appeals by the time that the defendant violated the statute. Those cases instead concerned whether a constitutional right was "clearly established" at the time at issue, so that a government actor who violated that right could be held liable criminally (under 18 U.S.C. 242 (1994 & Supp. IV 1998)) or civilly (under 42 U.S.C. 1983 (1994 & Supp. III 1997) or *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971)). See *Wilson*, 526 U.S. at 614-618; *Lanier*, 520 U.S. at 264-272.

3. Relying on *Neder* v. *United States*, 527 U.S. 1 (1999), Maria Goodson contends (Pet. 21-22) that the district court committed plain error in failing to instruct the jury that a falsehood charged in a mail fraud count must be material.[2]

The court of appeals correctly declined to address that claim, which Maria Goodson and her co-defendants sought to raise for the first time in a supplemental brief. It is well-settled that a defendant waives appellate consideration of an issue raised for the first time in a reply brief or later supplemental brief. See, *e.g.*, *Dunham* v. *Kisak*, 192 F.3d 1104, 1110 (7th Cir. 1999); *United States* v. *Universal Mgmt. Servs., Inc.*, 191 F.3d

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[2] As Maria Goodson notes (Pet. 18), the same issue has been raised in the petitions for a writ of certiorari filed by co-defendants Cleveland (No. 99-804) and Fred Goodson (No. 99-939). The Court, while granting a writ of certiorari in No. 99-804 on the question whether unissued video poker licenses constitute property for purposes of 18 U.S.C. 1341, has not granted a writ of certiorari on the materiality issue.

750, 759 (6th Cir. 1999), petition for cert. pending, No. 99-1517; *Orsini* v. *Wallace*, 913 F.2d 474, 476 n.2 (8th Cir. 1990), cert. denied, 498 U.S. 1128 (1991). Maria Goodson is not excused from that waiver because *Neder* was decided after the oral argument in the court of appeals. At the time that she filed her initial brief on appeal, there was a square conflict in the circuits with respect to whether the materiality of a charged falsehood is an element of mail fraud or wire fraud. Compare, *e.g.*, *United States* v. *Slaughter*, 128 F.3d 623, 629 (8th Cir. 1997) (materiality is not an element), and *United States* v. *Cochran*, 109 F.3d 660, 667 n.3 (10th Cir. 1997) (same), with *United States* v. *Rodriguez*, 140 F.3d 163, 167 (2d Cir. 1998) (materiality is an element), and *United States* v. *DeSantis*, 134 F.3d 760, 764 (6th Cir. 1998) (same).

In any event, Maria Goodson's claim is without merit because the district court gave an adequate materiality instruction in connection with the mail fraud counts. The theory of the government's case was that Maria Goodson and her co-defendants submitted documents to the State that concealed the true owners of TSG, Ltd., and other information that could complicate the State's assessment of the suitability of TSG, Ltd., and its owners as a video poker licensee. The court instructed the jury that, in order to constitute a scheme to defraud, an omission must be "reasonably calculated to deceive persons of ordinary prudence and comprehension" and must "conceal[] a *material* fact." R. App. 4407 (emphasis added). The jury was thus instructed that it could find the defendants guilty of mail fraud only if the information concealed was material.

4. Maria Goodson contends (Pet. 22-28) that the court of appeals applied an unduly "deferential" standard in evaluating whether the evidence was sufficient

to support her conviction, because the court stated that "[t]he evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, and the jury is free to choose among reasonable constructions of the evidence." Pet. App. 30a.

The same standard for reviewing the sufficiency of the evidence supporting a conviction has been invoked repeatedly by the courts of appeals. See, *e.g.*, *United States* v. *Ward*, 197 F.3d 1076, 1079 (11th Cir. 1999); *United States* v. *Rosso*, 179 F.3d 1102, 1106 (8th Cir. 1999); *United States* v. *Robinson*, 161 F.3d 463, 471 (7th Cir. 1998), cert. denied, 119 S. Ct. 1482 (1999); *United States* v. *Wynn*, 61 F.3d 921, 923 (D.C. Cir.), cert. denied, 516 U.S. 1015 (1995); *United States* v. *Seaton*, 45 F.3d 108, 110 (6th Cir.), cert. denied, 514 U.S. 1133 (1995); *United States* v. *Garcia*, 983 F.2d 1160, 1164 (1st Cir. 1993). Maria Goodson concedes (Pet. 27) that "all of the federal circuits and most state courts" apply such a standard.[3]

There is no reason to conclude that the court of appeals' application of that standard of review affected the outcome of the case. For example, although Maria Goodson contends (Pet. 22-23) that the standard caused the court to disregard certain evidence indicating that she was not legally required to report to state regulators her transfer of a 4.99% ownership interest in TSG, Ltd, to Benny Rayburn, she fails to identify any such

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[3] As Maria Goodson notes (Pet. 24-26 & n.19), a minority of States have, as a matter of state law, adopted a different standard, which provides that, when a conviction is based solely on circumstantial evidence, the circumstantial evidence must exclude every reasonable hypothesis of innocence. Because those cases are based on state law, they do not conflict with the decision below or the other federal decisions cited in the text.

evidence. The principal evidence that she cites for the proposition that ownership interests of less than 5% do not have to be reported, a letter from the State Police to owners of video gaming operations (Pet. App. 203a-205a), does not support a reasonable inference of innocence; rather, the letter states that persons with more than a 5% ownership interest in a video gaming operation must "meet all suitability requirements and qualifications for licensees" and that licensees must submit specified information on such persons. Other evidence, including the Affidavits of Full Disclosure that accompanied the license renewal applications (see *id.* at 92a-93a), established that ownership interests in *any* amount were required to be reported. The standard of review thus was irrelevant to the court's determination that Maria Goodson was required to report the transfer at issue.

5. Maria and Alexandros Goodson challenge (Pet. 28-30) the forfeiture of Fred Goodson's and Carl Cleveland's ownership interests in TSG, Ltd., and TSG, Inc. As petitioners note (*id.* at 30), a district court may invalidate an order of forfeiture under RICO if a third-party claimant proves, by a preponderance of the evidence, that he had a "legal right, title, or interest" in the forfeited property superior to that of the defendant at the time of the acts that gave rise to the forfeiture. 18 U.S.C. 1963(*l*)(6)(A). The district court correctly applied that standard in this case, concluding, after an evidentiary hearing, that petitioners failed to satisfy their burden of proving a "legal right, title, or interest" in the forfeited companies. Pet. App. 173a-174a. The court of appeals agreed. *Id.* at 42a-44a.

Petitioners contend (Pet. 28-29) that "a district court should be required to employ applicable state law principles when deciding the nature of an affected party's

property interest in criminally forfeited property." But neither the district court nor the court of appeals disagreed with that proposition. They simply declined to give effect to the "obviously false partnership agreement" that formed the basis for petitioners' claim of a "right, title, or interest" in the forfeited companies. Pet. App. 42a. As the court of appeals explained, "[t]he jury necessarily found that Fred Goodson and Carl Cleveland were the true owners of TSG, Ltd. and that [petitioners] were straw people used in the sham to hide the true ownership of TSG, Ltd." *Ibid.* Petitioners cite no Louisiana authority that would have compelled a conclusion that they were the true owners of the companies in the circumstances of this case, including the district court's findings that petitioners did not invest their own funds in the companies, did not manage the companies, and did not believe that they had any ownership interest in the companies at any relevant time. *Id.* at 171a-173a; see also *id.* at 42a-43a. In sum, the lower courts' fact-bound determination that petitioners had no valid "right, title, or interest" in the forfeited companies does not merit this Court's review.

CONCLUSION

As to the first question presented, the petition should be held pending the decision in *Cleveland* v. *United States*, No. 99-804, and disposed of in accordance with that decision. In all other respects, the petition should be denied.

Respectfully submitted.

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